SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

FILED DECEMBER 8, 1953

Probable Jurisdiction Noted February 2, 1953

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INDEX

	Original	Print
Record from the United States District Court for the Northern District of New York	1	1
Complaint to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission	1	1
Exhibit No. 1—Report and certificate of convenience and necessity dated July 17, 1942 to Joseph R. Hutton	8	6
Exhibit No. 2—Order reopening case, Report and amended certificate of convenience and necessity dated March 7, 1944 to Joseph R. Hutton	11	10
Exhibit No. 3—Report and certificate transfer dated August 18, 1947 from Joseph R. Hutton to Callanan Road Improvement Company	15	14
Exhibit No. 4—Report and orders of the Commission dated October 18, 1951 and March 17, 1952	21	22
Answer of the Interstate Commerce Commission	30	34

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—6351

	Original	Print
Record from the United States District Court for the Northern District of New York—Continued		
Answer of the United States	34	36
Notice and order constituting three-judge court	37	38
Notice by Cornell Steamboat Company of motion for intervention	39	40
Motion by Cornell Steamboat Company to intervene as defendant	40	41
Answer of Cornell Steamboat Company	44	44
Exhibit A—Second amended certificate and order, effective March 19, 1948	56	56
Order granting Cornell Steamboat Company permission to intervene and file answer	60	58
Opinion	61	59
Petition for appeal	74	71
Notice of appeal	75	72
Assignment of errors	77	73
Order allowing appeal	79	74
Citation (omitted in printing)	80	
Statement re service of appeal papers (omitted in printing)	82	
Praecipe for record	84	75
Docket entries	87	77
Clerk's certificate (omitted in printing)	88	
Statement of points and designation of parts of record to be printed	89	79
Order noting probable jurisdiction	91	80

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, a Corporation, South Bethlehem, New York, Plaintiff,

v.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT TO ENJOIN, SET ASIDE, ANNUL, AND SUSPEND AN ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed April 11, 1952

I

The above-named plaintiff brings this action under sections 316(a) and 17(9) of the Interstate Commerce Act (49 U.S.C. § 916(a) and 49 U.S.C. § 17(9)) and 28 U.S.C. § 1336, 1398, 2284, 2321-2325 and pursuant to section 10 of the Administrative Procedure Act (5 U.S.C. § 1009) temporarily to restrain, suspend and enjoin and permanently to enjoin, set aside, annul and suspend an order of October 18, 1951 of the Interstate Commerce Commission, by Division 4 thereof, as affirmed by an order of the Interstate Commerce Commission on reconsideration dated March 17, 1952.

II

Plaintiff is a corporation duly organized and existing under the laws of the state of New York and is engaged in performing a common carrier service by water between points in the New York Harbor and points along the Hudson River below and including Waterford, New York. This operation is authorized and carried on by plaintiff [fol. 2] pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission as the successor in interest to Joseph R. Hutton.

III

Plaintiff's predecessor in interest, Joseph R. Hutton, made an appropriate and proper application to the Interstate Commerce Commission pursuant to the provisions of 49 U.S.C. § 909(a) for a certificate of public convenience and necessity to continue his operation as a common carrier by water as of January 1, 1940. In due course, the Interstate Commerce Commission after a formal hearing issued to plaintiff's predecessor in interest a certificate of public convenience and necessity on July 17, 1942 authorizing operations as a common carrier by water in the transportation of commodities generally between points in the New York Harbor area, points on the Hudson River below its junction with the New York state barge canal, the New York state barge canal between the Hudson River and the Niagara including the Oswego branch and the Niagara River. This certificate became final and effective on and after October 5, 1942. (See Exhibit No. 1). Said certificate of July 17, 1942 did not specify the type of equipment plaintiff's predecessor was authorized to use and neither did said certificate specify the type of service plaintiff's predecessor was authorized to provide.

IV

Thereafter, on its own motion and without notice to plaintiff's predecessor in interest, the Commission by order dated March 7, 1944 reopened the earlier proceeding and vacated and set aside and revoked the earlier certificate of July 17, 1942 issued to plaintiff's predecessor in interest and in lieu thereof, issued an amended certificate dated March 7, 1944 and effective May 29, 1944, to plaintiff's predecessor authorizing operations as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels between the same [fol. 3] points as described in the earlier certificate of July 17, 1942 (See Exhibit No. 2). In due course this certificate was transferred to plaintiff herein modified only as to the scope of the territory authorized to be served (See Exhibit No. 3), and as such, plaintiff is the successor in interest to Joseph R. Hutton and is entitled to all right, title,

and interest in the certificate of plaintiff's predecessor in interest as is contemplated by 49 U.S.C. § 909(a).

V

In due course plaintiff filed a tariff with the Interstate Commerce Commission naming therein certain rates for the transportation of brick by tug and scow between certain named points on the Hudson River within the state of New York. Said tariff also made provision for allowances to shippers for furnishing any instrumentality used in such transportation service which allowances are permitted and authorized pursuant to the provisions of 49 U.S.C. § 914.

VI

Subsequently, a proceeding was instituted before the Interstate Commerce Commission to determine whether or not plaintiff was authorized to publish allowances pursuant to the provisions of 49 U.S.C. § 914 and if plaintiff was engaged in a type of operation commonly referred to as towing. Plaintiff contended before the examiner and Division 4 of the Interstate Commerce Commission that (1) plaintiff's certificate could not be revoked in any manner whatsoever; (2) that the Commission may not specify the type of equipment to be used by a water carrier operating pursuant to part III of the Interstate Commerce Act; (3) that the Commission's action in revoking, modifying and amending the certificate of plaintiff's predecessor in interest was illegal, unlawful and beyond the statutory power of the Interstate Commerce Commission; (4) that the Commission's order complained of herein was tantamount to a revocation or modification of the allowance provisions of [fol. 4] the Interstate Commerce Act (49 U.S.C. § 914); and (5) that the transportation practice complained of herein is intrastate commerce and beyond the jurisdiction of this Commission. Nevertheless, Division 4 of the Interstate Commerce Commission by its report and order dated October 18, 1951 and affirmed by the entire Commission by order dated March 17, 1952 (see Exhibit No. 4) held that plaintiff is engaged in performing the service of towage and that its tariff naming rates, charges and allowances in connection with said service should be cancelled on one

day's notice to the Commission and to the general public. Plaintiff specifically alleges and avers that the examiner's initial or recommended report and/or the report of October 18, 1951 of Division 4 did not contain findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact or law presented for consideration and determination by the plaintiff herein.

VII

The order of the Interstate Commerce Commission complained of herein will cause irreparable loss, injury and damage to plaintiff unless the effective date of said order is temporarily restrained, suspended, or enjoined until the final disposition of this cause by this honorable court. Neither of the defendants by law are responsible in damages for such loss or injury to the plaintiff if it is required to discontinue, suspend or abandon its present transportation services by the cancellation of the tariff provisions ordered by the Interstate Commerce Commission.

VIII

The order of October 18, 1951 by Division 4 as affirmed by the Commission's order of March 17, 1952 is unlawful and void for the reasons that:

(1) said order constitutes a revocation of plaintiff's certificate authorizing it to operate as a common carrier by water by non-self-propelled vessels with the use of separate towing vessels because said certificate does not re- [fol. 5] restrict plaintiff's use of towing vessels and non-self-propelled vessels in any manner whatsoever. The order of the Interstate Commerce Commission attempts to incorporate by reference in plaintiff's certificate a classification of water carriers which classification is not incorporated or referred to in plaintiff's certificate;

(2) Said order is predicated on the principle that the Commission may specify the service to be rendered in a certificate of public convenience and necessity issued under part III of the Interstate Commerce Act. Plaintiff avers specifically that said order of October 18, 1951 as affirmed by the order of March 7, 1952 is invalid, unlawful, and void, and constitutes an unreasonable, arbitrary and capricious

exercise of jurisdiction by the Commission in that said Commission is not permitted and authorized by the Interstate Commerce Act to specify the service to be rendered or the type of equipment to be used by a common carrier by water;

(3) the Commission's action in revoking, modifying and setting aside the certificate of plaintiff's predecessor in interest of July 17, 1942 was and is not authorized or permitted by the Interstate Commerce Act applicable to water carriers and its action in that regard was without authority in law and was unlawful and void;

(4) said order in effect revokes the allowance provisions of the Interstate Commerce Act (49 U. S. C. § 914) in that the Commission's order is impossible of performance. Plaintiff avers that the Commission is without authority in law to promulgate an order such as the one complained of herein which results in a modification of a separate provisions of the Interstate Commerce Act by interpretation or otherwise;

(5) that the Commission's order is unlawful, void, arbitrary and capricious because it violates section 8(b) of the Administrative Procedure Act (5 U. S. C. § 1007(b)) in that the Commission and its examiner failed and refused to make required rulings and to state its reasons or basis [fol. 6] upon each finding, conclusion, and exception presented by plaintiff upon material issues. Plaintiff further avers that the Commission is without authority in law to promulgate the order complained of herein for the reason that the transportation activity of plaintiff is in intrastate and not subject to the jurisdiction of the Interstate Commerce Commission.

For all of the foregoing reasons, the said order complained of is unlawful, void, arbitrary and capricious.

Wherefore, the plaintiff prays:

(1) that a court, consisting of three judges constituted as required by 28 U. S. C. § 2284 be convened; and that process and notice be given the defendants;

(2) that a judge of such Court issue a temporary restraining order against the effectiveness of the Commission's order of October 18, 1951, as affirmed by order of

March 17, 1952, to prevent the irreparable damage specified in paragraph VII above;

(3) that an interlocutory order or injunction suspending or restraining the enforcement, operation and execution of said order of the Commission be entered by the Court, pending final determination of this action;

(4) that, upon final hearing, the Court adjudicate, order and decree that the decision and order of October 18, 1951 and the order of March 17, 1952 of the Interstate Commerce Commission, and each of them, are unlawful, null and void and that they be annulled and set aside; that their operation, execution, and enforcement be forever enjoined; and that the defendants, their officers and agents, and others acting for them, be perpetually restrained and enjoined from taking any steps or instituting any action to enforce said decision and orders and each of them;

(5) that plaintiff be given such other, further, and general relief as may be equitable and proper in the premises.

Thomas W. Cantwell, 75 State Street, Albany, New York, Counsel for Plaintiff.

Of Counsel: James E. Wilson, De Sales Building, Washington, D. C.

[fol. 7] *Duly sworn to by Keith M. Callanan. Jurat omitted in printing.*

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[fol. 8] EXHIBIT No. 1 TO COMPLAINT

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports

INTERSTATE COMMERCE COMMISSION

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Submitted December 15, 1941. Decided July 17, 1942

1. Applicant's operation found to be that of a common carrier.

2. Public convenience and necessity found to require operation by applicant as a common carrier by water in the transportation of commodities generally between points on New York Harbor, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River. Certificate issued, and application in all other respects denied.

Richard F. Lenahan for applicant.

Robert D. Brooks, Grover R. James, and Richard Barnes for interveners.

R. W. Snow for Interstate Commerce Commission.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

By application filed May 31, 1941, Joseph R. Hutton, an individual of Kingston, N. Y., seeks a permit under section 309(f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water, in interstate or foreign commerce, in the transportation of commodities generally, except package freight and perishable goods, between points on Long Island Sound, New York Harbor, Hudson River, New York State Barge Canal System, Niagara River, and contiguous ports. The application is in the alternative, and requests a certificate if applicant is found to be a common carrier. Rail carriers operating in official territory intervened at the hearing. No one opposed the application.

[fol. 9] Applicant has been in operation for 37 years. He owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about 150 gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet.

A schedule of minimum charges filed by applicant applies on about 35 commodities. During the 1939 and 1940

seasons, waste paper, phosphate rock, wheat, corn, barley, flaxseed, sand, steel billets, pig iron, scrap iron, fertilizer, and superphosphate were transported between points on New York Harbor, the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Niagara River and the Hudson River including the Oswego branch, and the Niagara River. At an undisclosed time prior to 1939, applicant transported pig iron to Bridgeport, Conn., and grain to Port Jefferson, N. Y.

Applicant claims the status of a contract carrier but all transportation performed during 1939 and 1940 was obtained through brokers who act as applicant's agents and hold themselves out to the general public. We conclude that applicant's operation has been that of a common carrier of commodities generally between points on New York Harbor, the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River.

Under the act, if a carrier was in bona fide operation as a common carrier on January 1, 1940, and has so operated since that time, we are authorized to issue a certificate without requiring further proof that public convenience and necessity will be served. As previously shown, applicant's operation through the 1940 season was that of a common carrier. For the 1941 season, however, applicant chartered his entire fleet of vessels to one shipper, thereby interrupting his operation as a common carrier. Applicant intends to resume his normal operation in 1942.

Applicant has been in operation for 37 years and his ancestors conducted the operation prior thereto. This long continued successful operation together with the evidence of record warrants a finding that public convenience and necessity will be served by such operation.

We find that applicant is a common carrier by water; that public convenience and necessity require operation by applicant as a common carrier in interstate or foreign commerce, of commodities generally, between points on New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York

State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River; that applicant is fit, willing and able properly to perform said transportation, and that applicant is entitled to a certificate authorizing such operation, subject, however, to general conditions which are necessary to carry out, with respect to such operation, the requirements of Part III of the act and the orders, rules, and regulations of the Commission thereunder.

The application, except to the extent herein granted, will be denied.

An appropriate certificate and order will be issued.

[fol. 10]

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 17th day of July, A. D. 1942.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Joseph R. Hutton, an individual of Kingston, N. Y., having filed an application under the provisions of section 309 of the Interstate Commerce Act for a permit authorizing continuance of his operation as a contract carrier by water, or in the alternative for a certificate authorizing continuance of his operation as a common carrier, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require operation by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points on New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal be-

tween the Hudson River and the Niagara River including the Oswego branch, and the Niagara River.

It is ordered, That said applicant be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application, except to the extent granted herein, be and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after October 5, 1942.

By the Commission, division 4.

(S.) W. P. Bartel, Secretary. (Seal of Commission)

[fol. 11] EXHIBIT No. 2 TO COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of March, A. D. 1944.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing:

It is ordered, That said proceeding be, and it is hereby, reopened for reconsideration.

By the Commission, division 4.

(S.) W. P. Bartel, Secretary. (Seal).

[fol. 12] EXHIBIT NO. 2 TO COMPLAINT

This report will not be printed in full in the permanent series of the Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Decided March 7, 1944

Upon reconsideration, findings in prior report of July 17, 1942, modified by specifying the type of vessels to be used in the exercise of the authority granted in the certificate and order issued with the prior report. Amended certificate and order issued, and application in other respects denied.

Appearances as shown in proper report.

REPORT OF THE COMMISSION ON RECONSIDERATION

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

With our prior report of July 17, 1942, we issued a certificate and order which became effective on October 5, 1942, authorizing Joseph R. Hutton to continue operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points in New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River, including the Oswego branch, and the Niagara River.

In our prior report we did not specify the type of vessels to be used by applicant in the exercise of the authority granted. We have, therefore, reopened this proceeding upon our own motion for the purpose of giving further consideration to this matter. The facts stated in our prior

report will be repeated only to the extent necessary for clarity of discussion.

In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date. He would thus be in a position to enter into new fields of transportation without first establishing, in accordance with the provisions of the Interstate Commerce Act, that such extension of his services is required by the present or future public convenience and necessity or is consistent with the public interest and the national transportation policy declared in the act. For these reasons we will modify the authority previously granted by specifying the types of vessels operated by applicant on and since January 1, 1940.

On and since January 1, 1940, applicant has been engaged in a common carrier operation by the use of one steam power boat of about 240 horsepower, and four barges, all of which are operated as a unit. The power boat is used to tow the barges, but it also has a cargo-carrying capacity of about 150 gross tons.

[fol. 13] Upon reconsideration, we find that on and since January 1, 1940, Joseph R. Hutton has been engaged in operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined in our order of March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, points on the Hudson River below its junction with the Erie Canal of the New York State Canal System, the Erie and Oswego Canals of the New York State Canal System, and the Niagara River, and in other respects we adopt our findings in the prior report. For the reasons stated above and in the prior report, the application, except to the extent herein granted, will be denied.

An appropriate amended certificate and order will be issued.

[fol. 14] EXHIBIT No. 2 TO COMPLAINT

AMENDED CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of March, A. D. 1944.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

The record in this proceeding having received further consideration, and said division, on the date hereof, having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of July 17, 1942, is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of the Commission, division 4, entered on March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto,* points on the Hudson River below its junction with the Erie Canal of the New York State Canal System, the Erie and Oswego Canals of the New York State Canal System, and the Niagara River.

It is ordered, That said carrier be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application, except to the extent granted herein, be, and it is hereby, denied.

And It is further ordered, That the certificate and order issued on July 17, 1942, be, and it is hereby, superseded and canceled as of the date on which this amended certificate and order takes effect; and that this amended certificate and order shall take effect and be in force from and after May 29, 1944.

By the Commision, division 4.

(S.) W. P. Bartel, Secretary. (Seal of the I. C. C.)

[fol. 15] EXHIBIT No. 3 TO COMPLAINT

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 15669[1]

JOSEPH R. HUTTON CERTIFICATE TRANSFER

Submitted May 26, 1947. Decided August 18, 1947

Transfer to the Callanan Road Improvement Company of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton in Docket No. W-103, to the extent that such certificate authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, approved. Regulation prescribed.

James E. Wilson for applicants.

J. Agnew Myers, Jr., for protestant.

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[1] And, for the purpose of giving effect to the determination herein, No. W-103, Joseph R. Hutton Contract Carrier Application.

REPORT OF THE COMMISSION.

Division 4, Commissioners Mahaffie, Miller, and Mitchell

By Division 4:

Margaret K. Hutton, administratrix of the estate of Joseph R. Hutton, and The Callanan Road Improvement Company jointly applied on April 1, 1947, for approval under section 312 of the Interstate Commerce Act of transfer by the administratrix, hereinafter sometimes referred to as the transferor, to the Callanan company, later herein generally called the transferee, of the amended certificate dated March 7, 1944, issued to the decedent in Docket No. W-103. A protest was filed by the Northeastern Inland Waterways Association, a hearing was held, and the case was argued orally before the examiner. No representations have been made by State authorities.

Initially, in No. W-103, we issued a certificate dated July 17, 1942 authorizing Hutton to operate as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally on the waters and between the points therein specified, *Joseph R. Hutton Contract Carrier Application*, 250 I. C. C. 804. On reconsideration, we modified the findings in our initial determination by specifying also the types of vessels to be used in the operation so authorized, and issued the amended certificate accordingly, *Joseph R. Hutton Contract Carrier Application*, 260 I. C. C. 804.

[fol. 16] The amended certificate authorizes operation as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by our order dated March 26, 1941, in Ex Parte No. 140,[2] and points on the Hudson River below its junction[3] with the Erie Canal of the New York State Canal

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[2] Determination of the Limits of New York Harbor and Harbors Contiguous Thereto.

[3] At Waterford, N. Y., 3 or 4 miles north of Troy, N. Y., which is 8 or 9 miles north of Albany.

System, the Erie and Oswego canals, and the Niagara River.

Following a surgical operation performed in November 1944, Hutton died January 23, 1945. His widow was appointed administratrix of his estate by the Surrogate's Court of Ulster County, N. Y., on February 21, 1945, and, as such, is authorized to dispose of the estate's operating rights. She had nothing to do with the operation conducted by her husband, knows little about the business, and, for these reasons, has not attempted to continue his operation. Unable to conduct the business, her only recourse was to endeavor to dispose of the estate's water-carrier assets.

The business had been conducted for many years by Hutton, largely in person, and by his father and grandfather before him. In May 1941, when his application in No. W-103 was filed, he owned a steam-powered canal boat and 3 barges. He sold the power boat later in 1941, with the expectation of obtaining another. Eventually this was prevented by the war emergency, but he continued operation with tugs chartered from the Haakonsen Towing Company, hereinafter called Haakonsen.

Inquiry with respect to sale of the vessels and operating rights was begun by the transferor promptly on February 22, 1945. Haakonsen proposed to buy this property, and paid a cash deposit on the boats with the understanding that the remainder of the purchase price would be paid when the certificate was tranferred. We are informed that Haakonsen is engaged in the business of chartering floating equipment to others. Transfer of the certificate to Haakonsen never was proposed to us and, while the transferor testified that Haakonsen operated the barges during the summer of 1946, it seems probable that the vessels were operated by others under charter. The transferor was not in close touch with the situation, the affairs of the estate being left to her attorney. Two or three weeks before the hearing, the barges were sold at foreclosure, with the result that the estate received from that asset net proceeds of about $700.

On February 24, 1947, an officer of the transferee reported to that party's directors that negotiations with the transferor had led to an offer to sell the operating rights

for $2,750. This offer was accepted, and on March 21, 1947, the transferor and the transferee entered into a written agreement for such sale, subject to approval by us of transfer of the related certificate.

[fol. 17] The transferee, incorporated in New York in 1895, is not a carrier subject to part III of the act, and is not affiliated in any way with any subject carrier. It is authorized by its charter to own or lease vessels, and to do a towing business. It is engaged, among other things, in the production of road-building material (crushed stone, slag, and asphaltic products) and agricultural limestone, and in highway construction. It owns a quarry at South Bethlehem, N. Y., about 5 miles inland, and since 1937 has had a stone-crushing plant at Kingston, N. Y., on Rondout Creek, a tributary of the Hudson. It began shipping crushed stone by water in 1930, with chartered scows towed under contract. This service becoming unsatisfactory, the transferee bought a Diesel tug in the summer of 1946 and, since that time, has tranported its crushed stone and gravel on the Hudson, using from 15 to 25 scows under long-term charter arrangement.

The transferee's balance sheet as of January 1, 1947, shows assets aggregating $1,014,561 and, on the liability side, accounts and notes payable $523,900 capital stock $80,500, and corporate surplus $410,161. In 1946, the company earned net income amounting, after taxes, to $33,493. It presently employs about 300 persons. Its officers have had experience in transportation activities since 1931, and its New York City and Kingston agents have performed the details of dispatching vessels for several years.

In testimony for the protestant, mention is made of other carriers having authority to perform towage along the Hudson River, namely: Russell Bros. Towing Co.,[4] the Shamrock Towing Co., Inc., a contract carrier,[5] and the McCarren Towing Line, Inc.[6] The transferee comes in contact with only one, the Cornell Steamboat Company,

[4] 250 I. C. C. 429.

[5] 250 I. C. C. 788.

[6] 250 I. C. C. 68.

that handles brick, pig iron, and cement on the river between Waterford and New York City, and it was unsatisfactory service by this carrier that led the transferee to provide its own tug. When the transferee began its own operation, it was approached by other shippers with requests that the transferee also transport for them nonexempt commodities from Hudson River points, including Kingston and Coeymans, N. Y., to New York City. The transferee expects to operate successfully because the situation as to service affords an opportunity to demonstrate the possibilities of operation with modern equipment. It is interested, also, in obtaining additional business, and in operating its vessels as economically as possible.

The transferee intends to publish a tariff establishing rates for the transportation of brick, pig iron, and possibly cement. It would continue to handle its own business, with the freight of other shippers intermingled in tows, but it intends, irrespective of the exigencies of its own business, to move its revenue freight promptly in order to satisfy shipper requirements. If the revenue traffic is sufficiently profitable, it probably will add to its equipment. Additional tugs will be available as soon as transfer of the certificate is approved.

[fol. 18] The transferee is interested primarily in operation on the Hudson between Waterford and New York City. Its intentions with respect to operation beyond Waterford, on the State canals, are contingent and uncertain. It admits that, without expensive changes, its tug would not be suited to canal operation because of bridges and other obstructions. It has not been approached by shippers there and has made no serious investigation as to prospective business of that territory. While it desires to have the right to operate beyond Waterford, it would be satisfied to have the right to operate on the river between that point and New York Harbor and adjacent waters.

The protestant is an association of water carriers having members of three classes, including a division operating on the New York State Canal System and a general towing division. The association was represented at the hearing by its president, who is also president of one of the carrier members. He contends that the transferee is

primarily an industrial (or private) carrier, and that there now is a dearth of tonnage on the canals. That business appears to be the protestant's primary concern in this proceeding; and its objection to the proposed transfer herein would be largely satisfied by limitation of the superseding certificate to the river operation and to the commodities which the transferee expects to transport.

Hutton was a member of the association, and the association was aware of his illness and death. The witness expresses sympathy with the widow's problem, and disappointment with failure of the deal with Haakonsen, but the association heretofore has proferred her no assistance. It is stated that one or more operators on the canals who have not received certificates would be interested in acquiring the transferor's rights, but no counter proposal is offered or suggested. Yet the protestant argues that the transferor's failure to operate and furnish service after Hutton's death was due to laxness and neglect, and that this is tantamount to abandonment of his operation.

Abandonment of operation connotes cessation of service, or long disuse of facilities, coupled with the intention that such service or use of facilities shall not be resumed, *Akron & B. B. R. R. Co. Abandonment of Operation*, 239 I. C. C. 250, 254. Any such intention on the transferor's part is clearly negatived by the facts. The record shows that the transferor is anxious to settle the estate and provide for resumption of service by effecting a transfer of operating rights to one who will continue the operation, and that she has exerted every effort to that end within her power. Delay in accomplishing a sale was due to failure of the transaction previously arranged and failure of any others to manifest any interest in the matter until a willing buyer had been found. The record impresses us that, if the protestant did not indulge the expectation or hope that competition might be reduced through lapse of Hutton's certificate, at least it pursued with respect thereto the course of laissez faire. We are of the opinion, and find, that the suspension of operation under the amended certificate was caused by circumstances over which the transferor had no control, within the meaning of section 306.9 of the transfer rules and regulations prescribed by us pursuant to the provisions of section 312.

[fol. 19] The past operations of the transferor's predecessor are some evidence that the operation has served a useful purpose, and the record shows prospective patronage of the service as proposed to be resumed by the transferee. Consequently, we think that operation by the transferee will be consistent with the public interest, but we will prescribe the rule or regulation that the transferee shall maintain completely separate records and accounts for its private operation and for its common carrier operation.

The protestant contends that we erred in amending the certificate issued intially to Hutton by including self-propelled vessels in the types of equipment specified, and that the use of self-propelled vessels now should be eliminated. Counsel for the applicants points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424.

We think that any certificate may be revoked, canceled, or modified with the holder's consent. The present holder's interest in the amended certificate is to sell the operating rights thereby evidenced. Limitation of the certificate to authorize only the operation on the Hudson River will not defeat that transaction; and, if the transfer is approved, the transferee will become the potential holder. The transferee does not object to limitation of the certificate to the river operation, and has no present intention of reselling the operating rights it has contracted to purchase. Since the transferee has no definite purpose to operate on the canals and Niagara River, we shall not authorize it to do so. Accordingly, the authority contained in the superseding certificate to be issued herein will be limited to the river operation.

We find that The Callanan Road Improvement Company is fit, willing, and able properly to perform the common carrier service on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, that transfer to The Callanan Road Improvement Company of the amended

certificate dated March 7, 1944, issued to Joseph R. Hutton in No. W-103, insofar as such certificate authorizes the above-described operation, is consistent with the public interest, and that, if sale of the transferor's operating rights to the transferee is consummated, the latter will be entitled to a certificate authorizing it to perform that service. Upon receipt of notice that such sale has been consummated, a certificate superseding the amended certificate will be issued to the transferee.

Our findings herein contemp-ate that the transferee, before recording in its books acquisition of the operating rights of the transferor, first will submit the related journal entries for approval by us. Our policy with respect to amortization or writing off to proprietorship capital accounts of intangible property is discussed in *E. L. Skeel—Purchase—Jess Kuhns and Grays Harbor Lines, Inc.*, 40 M. C. C. 318.

An appropriate order will be entered.

[fol. 20] ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of August, A. D. 1947.

Finance Docket No. 15669

JOSEPH R. HUTTON CERTIFICATE TRANSFER

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, for the purpose of giving effect to the determination herein, the proceeding in No. W-103 be, and it is hereby reopened.

It is further ordered, That transfer to The Callanan Road

Improvement Company of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton in No. W-103, to the extent that such amended certificate authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, be, and it is hereby, approved.

It is further ordered, That, following consummation of the sale to the transferee of the operating rights covered by said amended certificate, said transferee may perform to the extent above described, the water-carrier service heretofore authorized under said amended certificate dated March 7, 1944, in No. W-103.

It is further ordered, That, within 20 days from and after consummation of said sale of operating rights, the transferee shall file with this Commission (1) a copy of the instrument by which said operating rights are conveyed to it, and (2) an opinion of counsel as to the fact of legal consummation of said sale.

And it is further ordered, That unless said sale is consummated on or before October 1, 1947, this order shall be of no further force or effect.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal).

[fol. 21] EXHIBIT NO. 4 TO COMPLAINT

Interstate Commerce Commission

No. W-103

Joseph R. Hutton Contract Carrier Application

Submitted July 12, 1951 Decided October 18, 1951

Petitioner, The Callanan Road Improvement Company, found to be engaged in the performance of towage service without appropriate authority, and rates, charges, and allowances made by it to shippers for the use of their own

scows in the performance of towage found to be unlawful and required to be canceled. Proceeding discontinued.

James E. Wilson for petitioner.

R. Granville Curry, Frederick M. Dolan, Paul L. Clugston, Reginald G. Narelle, Howard B. Harte, and Gerald M. McAllister for protestant and interveners.

Clemens F. Rauth for Interstate Commerce Commission.

Report of the Commission

Division 4, Commissioners Mahaffie, Rogers, and Mitchell

By Division 4:

Exceptions to the examiner's proposed report was filed by the petitioner, to which the protestant replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

This is a proceeding, pursuant to a petition of The Callanan Road Improvement Company, South Bethlehem, N. Y. (successor in interest to Joseph R. Hutton) called the petitioner, to determine whether certain of the petitioner's operations constitute freighting, a service which it is authorized to perform, or towing, a service which it is not specifically authorized to perform.

The Cornell Steamboat Company, Moran Towing & Transportation Company, Inc., McAllister Lighterage Line, Inc., and Card Towing Line, Inc., carriers that are authorized to perform towage on the Hudson River, and the Northeastern Inland Waterways Association, Inc., and the Canal Lakes Towing Company, Inc., intervened at the hearing in support of the complaint. The evidence in opposition to the petitioner was offered by the Cornell Steamboat Company, which will be referred to as the protestant. [fol. 22] In its exceptions to the examiner's report, the petitioner presents the following questions as determinative of the issue before us: (1) May a water carrier whose certificate specifies the service to be rendered by the use of non-self-propelled vessels with the use of separate tow-

ing vessels publish allowances for the use of its shippers' equipment even though the carrier does not specifically hold towing rights? (2) May the Commission by interpretation establish a principle which has the effect of modifying, restricting, or partially revoking a water carrier's certificate? And (3) is a water-carrier certificate which specifies the service to be rendered by describing the type of equipment to be used a valid exercise of the Commission's authority under part III of the act? It is the position of the petitioner that we are without authority to specify the service to be rendered in a water-carrier certificate, and that any effort on our part to do so exceeds our authority. The disposition of these general questions will be confined to the facts before us in this proceeding.

A brief summary of the character of the service which Joseph R. Hutton was authorized to operate under his certificate, and the circumstances and conditions under which the transfer of such authority was made to the petitioner, appears necessary to a proper determination of the issue.

On December 31, 1940, Joseph R. Hutton filed his application for exemption from regulation under the terms of section 303(e) of the act. Upon failure to establish such exemption, the application was denied on May 17, 1941. Upon his application for appropriate operating authority, it was found, after hearing, that applicant's operations were those of a common carrier by water in the transportation of commodities generally between points in New York Harbor, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River, including the Oswego branch, and the Niagara River. In accordance with the "grandfather" provisions of section 309(a), the applicant on July 17, 1942, was issued a certificate of public convenience and necessity authorizing continuance of his operations described of record as of January 1, 1940, subject, however, to such terms, conditions, and limitations as were attached to the exercise of the authority granted. *Joseph R. Hutton Contract Carrier Application*, 250 I.C.C. 804.

The applicant owned and managed one steam power boat of about 240 horsepower, and four barges, all of which were

operated as a unit. The power boat was used in towing the barges and constructed so as to carry also about 150 gross tons of freight. On occasions, other barges were rented or chartered for operations in the applicant's fleet. During the seasons of 1939 and 1940, waste paper, phosphate rock, wheat, corn, barley, flaxseed, sand, steel, billets, pig iron, scrap iron, fertilizer, and superphosphate were transported between points in New York Harbor, on the Hudson River below its junction with the New York State Barge Canal, and on the New York State Barge Canal between the Niagara River and the Hudson River, including the Oswego branch, and the Niagara River. As the applicant had been in bona fide operation as a common carrier on January 1, 1940, we were authorized to issue the certificate without requiring further proof that public convenience and necessity would be served thereby.

[fol. 23] Through inadvertence, the certificate and order did not define the conditions and limitations, including the nature of the services which would attach to and govern the carrier's operations. Section 304(c), among other things, authorizes us to establish from time to time such just and reasonable classifications of groups of carriers included in the term "common carrier by water" as the special nature of the services performed by such carriers shall require, together with such just and reasonable rules, regulations, and requirements consistent with the provisions of part III, which must be observed by the carriers so classified or grouped, as after hearing we find to be necessary or desirable in the public interest. Our practice in this respect is described in *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253-4, affirmed, as to this matter, by the entire Commission, 265 I.C.C. 313, 314.

Subsequently, on reconsideration, the proceeding was reopened and division 4 modified the findings in the initial determination by specifying the types of vessels to be used, and issued an amended certificate and order effective May 29, 1944, which authorized Joseph R. Hutton to operate as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, between the same points as described in the certificate issued on July 17, 1942, which was superseded and canceled.

Joseph R. Hutton Contract Carrier Application, 260 I.C.C. 804.

Joseph R. Hutton died in January 1945, and his widow was appointed administratrix of his estate with authority to dispose of the estate's operating rights. Hutton sold his power boat in 1941, but continued operation with chartered tugs. In Finance Docket No. 15669, *Joseph R. Hutton Certificate Transfer* (not printed in full), 265 I.C.C. —, decided August 18, 1947, division 4 authorized the transfer of the estate's operating rights from the transferor, the widow, to the transferee, the petitioner herein, through the cancellation of the rights previously granted to the transferor and the issuance of an amended certificate and order to the transferee upon the consummation of the sale of the transferor's operating rights to the transferee. All of the former operating rights held by Hutton were not transfered to the petitioner. The division authorized the transfer only of that part of the certificate covering operations on the Hudson River between Waterford, N.Y., and New York, N.Y., subject to all of the conditions and limitations which attached to the Hutton rights.

In that proceeding the Northeastern Inland Waterways Association, intervener, contended that we erred in amending the certificate issued initially to Hutton by including self-propelled vessels in the types of equipment specified and that authority to use self-propelled vessels by Hutton should be eliminated from the certificate to be issued to the petitioner under the sale agreement. Counsel for the petitioner-applicant contended that the certificate could not be attacked collaterally in that proceeding, and further, that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation [fol. 23a] in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. The facts in the *Seatrain case* differ from those in the Hutton transfer proceeding, Finance Docket No. 15669. There was no consent of the parties in the *Seatrain case*. In the transfer proceeding the division stated its position in respect of the contentions there made in the following language, which we think is also pertinent here:

> We think that any certificate may be revoked, canceled, or modified with the holder's consent. The pres-

ent holder's interest in the amended certificate is to sell the operating rights thereby evidenced. Limitation of the certificate to authorize only the operation on the Hudson River will not defeat that transaction; and if the transfer is approved, the transferee will become the potential holder. The transferee does not object to limitation of the certificate to the river operation, and has no present intention of reselling the operating rights it has contracted to purchase. Since the transferee has no definite purpose to operate on the canals and Niagara River, we shall not authorize it to do so. Accordingly, the authority contained in the superseding certificate to be issued herein will be limited to the river operation.

On September 11, 1947, the transaction authorized in Finance Docket No. 15669 was consummated, and the bill of sale, properly notarized, was filed with us on September 19, 1947. On February 5, 1948, the transferor having assented to the partial cancellation of the amended certificate of March 7, 1944, and the transfer of her remaining operating rights to the transferee (petitioner herein), a second amended certificate and order were issued to The Callanan Road Improvement Company, under which the petitioner is authorized to operate as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of division 4, entered on March 26, 1941, in Ex Parte No. 140, Determination of the Limits of New York Harbor and Harbors Contiguous Thereto, and points along the Hudson River below and including Waterford.

The petitioner owns two towboats, one of 700 horsepower and the other of 150 horsepower. It charters a towboat of 805 horsepower and engages other towboats under so-called short charters as the exigencies of its business may dictate. In such cases the crews are furnished by the owners of the towboats, except that the petitioner selects the pilots who are paid by the owners of the tugs. All of the scows chartered and used by the petitioner are chartered with a captain.

[fol. 24] The petitioner, among other things, produces crushed stone at Kingston, N. Y., and transports such commodity down the Hudson River in its vessels for sale and delivery in the New York Harbor area. In the same tows in which the crushed stone is transported it operates as a carrier for hire in the movement of brick loaded on its deck scows or chartered scows, and on scows of the shippers for which it makes allowances in accordance with its tariff I.C.C. No. 2. The shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him.

No question is raised concerning the right of the petitioner to transport its own crushed stone, or to operate under its certificate as a common carrier in the transportation of brick with scows chartered or provided by it and not by the shipper. The protestant on May 11, 1949, complained to the Commission that the petitioner's tariff I. C. C. No. 2, which became effective on April 17, 1949, embodies rates which contemplate the service of mere towage, and that the performance of such service violates the petitioner's certificate authorizing the transportation of property by non-self-propelled vessels with the use of separate towing vessels (commonly referred to as freighting). On September 19, 1950, the Commission's Bureau of Water Carriers and Freight Forwarders informed the petitioner that, in view of the findings of division 2 in *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, hereinafter called the *Dixie case*, it appeared that the service contemplated under allowances provided in its tariff would constitute towage, and that inasmuch as it was not authorized to engage in such service, the performance thereof would be unlawful. The petitioner replied on September 25, 1950, that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie case* when the order therein became effective. On January 5, 1951, and after that order became effective on December 26, 1950, the petitioner filed the instant petition, requesting a statement of the Commission's position in a formal proceeding and a finding that the petitioner's present tariff provisions with respect to allowances are just and reasonable and that, under its certificate, it is legally authorized to publish and observe such provisions in its rela-

tions with shippers. It asked particularly for an opportunity to distinguish the facts to be presented from those in the *Dixie case*. Such an opportunity has been afforded the petitioner.

At the same time that the instant petition was filed, the petitioner also filed (1) a request for temporary authority under section 311(a) of the act, No. W-103 (Sub-No. 2), to perform general towage between points along the Hudson River; (2) an application under section 5 of the act, Finance Docket No. 17202, to purchase the Hudson River towage rights of L. B. Shaw, Inc.; and (3) an application under section 309(c) of the act, No. W-103 (Sub-No. 1), for a certificate of public convenience and necessity authorizing operation as a common carrier in the performance of general towage on the Hudson River. By order of January 31, 1951, the request for temporary authority was denied in that the petitioner had failed to show that there was no other carrier service capable of meeting the need for towage service between the points covered thereby. The remaining applications are pending.

[fol. 25] The petitioner's tariff I. C. C. No. 2, among other things, names commodity rates applicable on standard and oversize brick by tug and scow from Catskill Point, Coeymans, Glasco, Malden, and Roseton, N. Y., on the Hudson River, to a point in New York Harbor adjacent to the Statue of Liberty. These rates do not include insurance. The same rates also apply on the movement of brick in scows furnished by shippers, for which so-called allowances are made and the demurrage rules are inapplicable. When the petitioner is not required to return the shipper's scow light to point of origin, a "credit" or additional allowance is made. For example, the tariff provides a rate of $2.24 per 1,000 standard brick, minimum cargo 350,000, from Coeymans to the designated point in New York Harbor. For the use of the shipper's scow, the petitioner makes an allowance of 93 cents per 1,000 brick, which results in a net rate of $1.31 to the shipper and owner of the scow. In the event the petitioner does not return the empty scow to Coeymans, it makes a flat allowance or gives a credit to the shipper of $65. The credit varies with the distance the scow is towed light. While the petitioner's rates in con-

nection with the movement of brick have been reduced twice, the allowances or credits have remained unchanged.

There is no evidence that the petitioner transported any brick under the rates as originally published on April 17, 1949, or as reduced on June 26, 1949. Following the further reduction in the rates on March 26, 1950, in each month during the 1950 season of navigation on the Hudson River, from April to December, the petitioner moved a number of scowloads of brick from up-river points to New York Harbor, aggregating 407 scowloads for seven shippers. Except for 28 shipments handled in scows furnished by the petitioner, the scows used in the performance of this transportation were furnished by shippers of brick to whom it made allowances.

The protestant has been engaged in general towage on the Hudson River for many years. See *Cornell Steamboat Co. Contract Carrier Application*, 250 I. C. C. 577. Its certificate to operate as a common carrier by water is limited to that service only, while the petitioner's certificate, as above indicated, is limited to the performance of freighting service by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. The transportation of property by a water common carrier by non-self-propelled vessels with the use of separate towing vessels, for the purpose of the voyage, is in effect service by one vessel or unit under the contract of affreightment. The service performed by towers falls within a classification distinguishable from that just mentioned. They propel vessels from place to place and, unless the transportation is exempt, are subject to our jurisdiction under part III. See *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634. The authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities by non-self-propelled vessels with the use of separate towing vessels.

[fol. 26] Prior to the 1950 season of navigation, the protestant provided towage for six of the brick shippers served by the petitioner in that year by the movement of their scows, loaded and light, on the Hudson River. The only other shipper served by the petitioner, Athens Brick Company, entered the business of manufacturing brick in

September 1950, as successor-in-interest to the Mayone Brick Company for whom the protestant had also provided towage service. The protestant's rates, like those of the petitioner, are in cents per 1,000 brick, and include the return of light scows to points of origin. Also, the petitioner's net rates, after the allowances made by it for the shippers' scows, are the same as the towage rates of the protestant. Within the period of a year, the rates of the two carriers were reduced an average of 21.5 cents per 1,000 brick. For example, in April 1949 the protestant's rate and the rate of the petitioner, after an allowance for the shipper's scow, from Glasco to New York Harbor, were $1.11. By April 13, 1950, both carriers had reduced these rates to 90 cents.

No bills of lading or shipping orders were or are issued by the petitioner in connection with the transportation of the shippers' scows loaded with brick. Nor are there any written agreements between the parties bearing on the use of such scows by the petitioner. Under the arrangements by which the scows are used the petitioner may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor.

The facts related do not differ materially from those in the *Dixie case*, wherein it was found that the transportation concerned was a towage service. The petitioner, while contrasting the circumstances in the two proceedings by an erroneous interpretation of the facts and findings in the *Dixie case*, contends that by reason of section 314 of the act it is permitted to make allowances for the use of the shippers' scows in the performance of a freighting service, citing *Campbell Transp. Co. Common Carrier Application*, 260 I. C. C. 107, 110. Therein, division 4 found that a carrier authorized to engage in the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels is not prohibited from using shippers' barges as a part of its equipment in performing a complete freighting service, provided the arrangements for such use are reasonable and otherwise lawful.

In applying the principle laid down in the *Campbell case* to the facts in the instant proceeding, the present issue must be resolved by the test of whether shippers' scows are used as a part of petitioner's equipment or are received by it as a part of the consignment to be towed. On this point the record is clear. Petitioner's rates applicable to the movement of brick from up-river points to New York Harbor provide for the return of shippers' scows light to points of origin, and as hereinbefore stated, its published rules with respect to free time and demurrage are inapplicable when scows are furnished by shippers. In addition, peti- [fol. 27] tioner admits that it may not load a shipper's scow at New York for an up-stream movement in lieu of returning the vessel light to its owner at origin. The fact that a charge is made for return of the empty scow to point of origin indicates that its original tender to the carrier was as a part of the consignment to be towed. From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioner in connection with the movement of freight in shippers' scows constitutes a towage service.

As stated by division 2 in the *Dixie case*, the carriers whose certificates or permits do not specifically authorize them to perform the service of towage are without authority to engage in such service. On the record before us, we must find that since the petitioner has no authority for the maintenance of rates, charges, or allowances, such as those published in its tariff I. C. C. No. 2, applicable to towage, such rates, charges, and allowances should be cancelled.

We conclude that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I. C. C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful.

An order will be entered requiring the cancellation of the rates, charges, and allowances described, and discontinuing the proceeding.

Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of October, A. D. 1951.

No. W-103

Joseph R. Hutton Contract Carrier Application

It appearing, That by notice dated February 6, 1951, the Commission assigned for hearing the petition of The Callanan Road Improvement Company filed January 5, 1951, for interpretation of its certificate No. W-103, and for formal disposition of the Cornell Steamboat Company's complaint of May 11, 1949, concerning the alleged performance of unauthorized towage by The Callanan Road Improvement Company;

It further appearing, That full investigation of the matters and things involved has been made, and that division 4, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the petitioner herein, The Callanan Road Improvement Company, be, and it is hereby, notified and required, on or before November 24, 1951, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 306 of the Interstate Commerce Act, to cancel the rates, charges and allowances described in said report and therein found to be unlawful;

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 29] EXHIBIT NO. 4 TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 17th day of March, A. D. 1952.

No. W-103

Joseph R. Hutton Contract Carrier Application

Upon consideration of the record in the above-entitled proceeding, and of petition of The Callanan Road Improvement Company, successor in interest to Joseph R. Hutton, for reconsideration, and it appearing that the reasons set forth in said petition do not justify reopening the proceeding for reconsideration:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 29a] [File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed June 7, 1952

The Interstate Commerce Commission, one of the defendants in the above-entitled proceeding, for answer to the complaint states:

I

The Commission admits, for the purposes of this action, the allegations of paragraphs I, II, III, IV and V of the complaint.

II

Answering paragraph VI, the Commission admits that the plaintiff herein, on January 5, 1951, petitioned the-

Commission to institute a proceeding to determine whether certain of plaintiff's operations constitute freighting, a service which plaintiff is authorized to perform, or towing, a service which it is not specifically authorized to perform; that such proceeding was instituted by the Commission on February 6, 1951, and was assigned for hearing and heard before an examiner of the Commission on February 23, 1951; that at said hearing a substantial volume of evidence, consisting of upwards of 150 pages of testimony and five documentary exhibits, was introduced by the parties, in-
[fol. 31] cluding the plaintiff herein, the Cornell Steamboat Company, and other protestants; that thereafter briefs were filed by the parties and, on May 28, 1951, an examiner's proposed report was issued and served, to which exceptions were filed by the plaintiff herein, and said exceptions were replied to by protestant Cornell Steamboat Company; that on October 18, 1951, Division 4 of the Commission (consisting of Commissioners Mahaffie, Rogers and Mitchell) issued and served upon the parties a report and order, *Joseph R. Hutton Contract Carrier Application*, 285 I.C.C. 75, a typewritten copy of which is attached to the complaint herein as Exhibit No. 4; that thereafter, on December 26, 1951, plaintiff filed a petition for reconsideration, which petition was replied to by protestant Cornell Steamboat Company, and said petition was denied by order of the entire Commission on March 17, 1952; that the effective date of said order of October 18, 1951, which was originally November 24, 1951, has subsequently been postponed from time to time until June 21, 1952.

III

Answering paragraphs VII and VIII, the Commission denies the allegations thereof and denies that its said orders of October 18, 1951, and March 17, 1952, are unlawful or void for the reasons, or for any reason, set forth in said paragraphs. The Commission denies that said orders will cause plaintiff irreparable loss, injury or damage or any legal injury.

Further answering subparagraph 3 of paragraph VIII, the Commission alleges that plaintiff may not in this proceeding collaterally attack the validity of the orders which

modified the certificate of July 17, 1942, issued to Joseph R. Hutton.

Further answering subparagraph 5 of paragraph VIII, the Commission alleges that plaintiff did not present to the Division or the Commission the issue of whether plaintiff's [fols. 32-33] activity was in intrastate commerce and consequently that issue is not one for initial determination by the Court.

IV

Except as expressly admitted herein, the Commission denies each of and all the allegations in said complaint to the extent that they are inconsistent with the aforesaid report and order of October 18, 1951, which said report and order are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By Edward M. Reidy, Chief Counsel; C. H. Johns, Attorney.

June 5, 1952.

[fol. 33a] [File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Answer of the United States of America—Filed June 14, 1952

Now comes the United States of America, defendant, and for answer to the complaint of plaintiff filed in the above-captioned action admits, denies and avers as hereinafter set forth:

1. Answering the allegations of paragraph I, the United States admits that the Court has jurisdiction to entertain the action to set aside and enjoin an order of the Interstate

Commerce Commission determining the scope of plaintiff's authority to engage in the transportation of interstate commerce as a water carrier under a certificate of public convenience and necessity issued by the Commission. The United States denies the alleged application of Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) to this action.

2. Answering the allegations of paragraph II, the United States admits that plaintiff is engaged in performing a common carrier service by water between points in the New York Harbor and points along the Hudson River below and including Waterford, New York, but for a complete statement of the scope of such authority respectfully invites the Court's attention to the certificate issued to plaintiff by the Commission.

[fols. 35-36] 3. Answering the allegations of paragraphs III to VI inclusive, the United States admits the occurrence of the various procedural steps in the administrative history of this action before the Commission but denies all inferences and conclusions drawn therefrom by the plaintiff. For further answer to paragarph VI, the United States denies the last sentence thereof.

4. Answering the allegations of paragraph VII, the United States denies the first sentence, and admits the second sentence thereof.

5. Answering the allegations of paragraph VIII, the United States denies all allegations therein contained to the effect that the Commission's order is invalid, void, arbitrary or capricious, or otherwise unlawful.

6. For purposes of a general answer to the complaint of plaintiff, the United States avers that the reports and orders therein assailed were made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing, and that the reports and orders are lawful and valid in all respects. Defendant, United States, denies that said reports and orders are invalid for the reasons assigned in plaintiff's complaint, or for any reason whatsoever.

Wherefore, having fully answered the complaint, the United States prays that the relief therein sought be denied and the complaint dismissed with costs to plaintiff, and that

defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

H. G. Morison, Assistant Attorney General; James E. Kilday, Special Assistant to the Attorney General; Edmund Port, United States Attorney, Attorneys for the United States of America, Defendant.

[fol. 36a] [File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE AND ORDER CONSTITUTING THREE-JUDGE COURT—Filed May 6, 1952

To the Chief Judge of the United States Circuit Court of Appeals, Second Circuit:

Pursuant to Title 28, United States Code 2284, I hereby notify you that on April 11, 1952 a complaint to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission was filed in the above-entitled action, which under Title 28, United States Code, 2325, is required to be heard and determined by a District Court of three judges.

James T. Foley, Judge.

Dated: April 21, 1952, Albany, New York.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

Pursuant to the provisions of Section 2284, Title 28, United States Code, I hereby designate the Honorable Charles E. Clark, a Circuit Judge of the Second Circuit, and the Honorable Stephen W. Brennan, a United States District Judge for the Northern District of New York, to sit with the Honorable James T. Foley, a United States District Judge for the Northern District of New York, to hear and adjudicate the above-entitled cause.

Thomas W. Swan, Chief Judge, Second Circuit.

Dated: April 30, 1952.

[fol. 38a] [File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE BY CORNELL STEAMBOAT COMPANY OF MOTION FOR INTERVENTION—Filed July 18, 1952

To Attorneys for Plaintiff and Defendants:

Please take notice that on the motion of Cornell Steamboat Company, and its proposed intervening answer, copies of both of which are hereto attached, and on the pleadings in this suit, the undersigned will petition this Court, at the Federal Court House in the City of Albany, State of New York, on the 25th day of July, 1952, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order permitting Cornell Steamboat Company, petitioner herein, to intervene as defendant in the above-entitled cause, and for such other relief as may be just.

Cornell Steamboat Company, By its Attorneys: Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C.; Reilly & Reilly, by Desmond J. Reilly, 200 State Ct., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., Of Counsel.

July 15, 1952.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION BY CORNELL STEAMBOAT COMPANY TO INTERVENE AS DEFENDANT—Filed July 18, 1952

To the Judges of the District Court of the United States for the Northern District of New York:

Cornell Steamboat Company respectfully alleges and shows as follows:

I

Petitioner, Cornell Steamboat Company (referred to herein as Cornell), is, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of New York with its principal office at Kingston, New York, and is and was engaged as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y., and N. J., as that harbor is defined in the order of the Interstate Commerce Commission, dated March 26, 1941, in Ex Parte 140, and Waterford, N. Y., and intermediate points on the Hudson River.

II

The Interstate Commerce Commission by a certificate and order dated February 2, 1943, has granted Cornell authority to operate in general towage and on the waters, as described in paragraph I. (250 I. C. C. 577).

[fol. 41] III

The Callanan Road Improvement Company, plaintiff in the present proceeding was authorized by the Interstate Commerce Commission in its report and order, dated August 18, 1947, to acquire the operating rights of Joseph R. Hutton to the extent that they were and are applicable on the Hudson River between Waterford, New York, and New York Harbor. Such operating rights are for transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels, and are

generally known as *freighting*, as distinguished from *towage* rights. The Commission on February 5, 1948, issued to plaintiff a certificate (Second Amended Certificate) authorizing it to conduct such freighting services.

IV

Thereafter, plaintiff published tariffs naming rates between various points on the Hudson River and New York Harbor and purporting to provide allowances from such rates to shippers in connection with barges furnished by such shippers.

V

Cornell by telegram dated May 11, 1949 and by later representations complained to the Commission that plaintiff through the allowance device set forth in its tariffs was conducting "towage" services beyond the authority in its certificate of convenience and necessity and that such unlawful practice should be terminated. The Director of the Commission's Bureau of Water Carriers & Freight Forwarders by letter, dated December 27, 1950, communicated with plaintiff directing attention to the alleged violation and calling upon it to cease and desist therefrom.

VI

Thereafter, on January 5, 1951, plaintiff filed a petition with the Commission requesting it to interpret plaintiff's "position in a formal proceeding and to find thereafter that its present tariff provisions with respect to allowances are just and reasonable and that it is, under its certificate, [fol. 42] legally authorized to publish and observe such provisions in its relations with its shippers". The Commission through an Examiner on February 23, 1951, held a hearing on the aforesaid petition by plaintiff for interpretation and on said telegraphic complaint of Cornell alleging performance of unauthorized towage by plaintiff. Cornell and certain other water carriers entered their appearances at the hearing as parties in opposition to plaintiff's petition. Cornell introduced evidence in opposition and filed briefs at every stage of the proceeding before the Commission. The Examiner filed a report finding against the con-

tentions of plaintiff and holding that the service complained of by Cornell was and is unauthorized towage. On exceptions Division 4 of the Commission by report and order, dated October 18, 1951 (Exhibit 4 to the complaint herein) upheld the Examiner and ordered the allowance provisions of the tariff in respect to such unauthorized towage to be cancelled. Plaintiff then filed a petition for reconsideration by the entire Commission but such petition was denied on March 17, 1952, and the Division's decision was thereby affirmed and sustained.

VII

The present suit by Callanan seeks to set aside the report and order of Division 4, dated October 18, 1951, as affirmed by the entire Commission on petition for reconsideration.

VIII

As hereinabove set forth, Cornell was a party to the above-mentioned proceeding before the Commission and is referred to and dealt with as such in said report of Division 4, dated October 18, 1951. Petitioner, therefore, has a statutory right to intervene in the litigation in the present proceeding, as defendant, by virtue of the provisions of United States Code, Title 28, Section 2323, reading:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

[fol. 43] This motion is made pursuant to such statutory authority and in accordance with the procedure provided for in Rule 24(a) of the Federal Rules of Civil Procedure (28 U.S.C.A. Rules of Civil Procedure, Rule 24).

IX

Petitioner in the above-mentioned proceeding showed that the unlawful and unauthorized practice complained of

by petitioner and considered by the Commission in the report of October 18, 1951 (Exhibit No. 4 to the complaint in the present proceeding) has resulted in loss of traffic and revenues approximating $258,000.00 for one year alone and petitioner alleges that continuation of such unlawful and unauthorized practice will cause it to suffer severe losses of traffic and revenues, if the above-mentioned order of the Commission should be enjoined and set aside, as prayed for by Callanan. Cornell's intervention in the above-entitled cause is, therefore, necessary for the protection of its interests.

Wherefore, petitioner respectfully prays that this court make an order granting it leave to intervene in the above-entitled cause, as defendant, with leave to file the attached answer therein, and for such other and further relief as to this court seems just.

Cornell Steamboat Company, By its Attorneys, Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C. Reilly & Reilly, by Desmond J. Reilly, 200 State St., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., Of Counsel.

July 15, 1952.

[fol. 44] In United States District Court.

[Title omitted]

Answer of Cornell Steamboat Company—Filed July 18, 1952

Comes now Cornell Steamboat Company, intervening defendant, and in answer to the complaint herein, respectfully represents:

I

This defendant, hereinafter referred to as Cornell, admits the allegations of fact in paragraph I of the complaint.

II.

Cornell admits the allegations of fact in paragraph II of the complaint.

III

Cornell admits the allegations of fact in paragraph III of the complaint.

IV

Cornell admits the allegations of fact in paragraph IV of the complaint but alleges that the Commission's amended certificate and order dated March 7, 1944, referred to by plaintiff herein was not to become effective until May 29, 1944, and it thus provided for ample time, namely, over two and a half months from the date thereof, for objection, if any, by plaintiff's predecessor in interest, namely, Joseph R. Hutton, for petition for reconsideration or review by the Commission of such amended order; that plaintiff's [fol. 45] predecessor in interest made no objection to and filed no petition for reconsideration or review of such amended order by the Commission and thus acquiesced and consented to the amended certificate and neither plaintiff nor its predecessor in interest can now complain that such amended certificate, upon becoming effective on May 29, 1944, resulted in any improper revocation of the original certificate issued July 17, 1942, or any part thereof. The amended certificate thus consented to, expressly certified that "public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between" the points referred to in the amended certificate; and thus authorized what is commonly known and recognized as "freighting" services as distinguished from, and exclusive of, "towage" services.

Cornell further alleges that when later, on August 18, 1947, Division 4 of the Commission entered the order, referred to by plaintiff, authorizing transfer to plaintiff of the amended certificate dated March 7, 1944, to the extent that said amended certificate authorizes operation on the Hudson River between Waterford, N. Y., and New York

Harbor, such transfer was of freighting rights only, namely of rights only to perform transportation by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in the transportation of commodities generally, and did not include the right to perform towage; that for the rights so transferred plaintiff paid only $2,750; and that plaintiff acquiesced in, and consented to, such amended certificate and affirmatively contended that the rights described therein, to the extent applicable on the Hudson River, were proper and valid. Plaintiff contended that such amended certificate "may not be attacked collaterally" in the proceeding before the Commission; "that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not sub- [fol. 46] ject to revocation in whole or in part" (plaintiff's Exhibit No. 3, sheet 5); and that the amended certificate must be upheld. The order dated August 18, 1947 (plaintiff's Exhibit No. 3) authorizing the transfer of rights described in the amended certificate of March 7, 1944, to the extent applicable on the Hudson River, provided that a showing should be made to the Commission of consummation of the sale of the operating rights referred to in the order of transfer, within 20 days after such consummation. Such showing was made and thereafter on February 5, 1948, the Commission issued its second amended certificate and order (a copy of which is attached hereto as Exhibit A). Such second amended certificate and order authorizes operation by plaintiff by the same terms and description of the operation as contained in the amended certificate dated March 7, 1944, to the extent applicable on the Hudson River. Neither plaintiff nor its predecessor in interest objected to the Commission's order of transfer dated August 18, 1947, or to the second amended certificate and order dated February 5, 1948. Nor did they file petitions for reconsideration, modification or review of such action by the Commission. Plaintiff thus consented to, and is bound by, the terms and provisions of the order of transfer dated August 18, 1947, and the second amended certificate and order, dated February 5, 1948, and cannot properly attack either order in this proceeding or in any proceeding.

Cornell further alleges that by the transfer of operating rights to plaintiff as authorized by the Commission's order

of August 18, 1947, and the issuance of the second amended certificate, dated February 5, 1948, plaintiff was authorized to perform only a freighting service and not a towage service; and that plaintiff in the proceeding for interpretation out of which the present suit arose admitted at the hearing on February 23, 1951, therein that the service authorized by plaintiff's certificate does not include towage.

V

Cornell admits the allegations of fact in paragraph V of the complaint except that if such allegations are intended to show or imply that the allowances to shippers published in plaintiff's tariffs are permitted or authorized by any provisions of law, Cornell denies such meaning or implica-
[fol. 47] tion and denies that any allowance may lawfully be made by plaintiff to shippers for scows or other vessels furnished by them under such tariffs. Cornell alleges that the allowance provisions of the Interstate Commerce Act (section 314, 49 U. S. C. sec. 915) are applicable only in connection with transportation services which the carrier may lawfully perform; that the transportation as to which plaintiff seeks to pay allowances is towage service outside and beyond the authority granted to it by its certificate; and that the allowances provided for in plaintiff's tariffs are therefore unauthorized and unlawful.

VI

Cornell admits the allegations of fact in paragraph VI of the complaint except that it denies that plaintiff contended before either Division 4 or the entire Commission "that the transportation practice complained of herein is intrastate commerce and beyond the jurisdiction of this Commission" and it denies that the Examiner's report or the report of Division 4 failed to contain findings, conclusions or reasons material to or necessary for consideration and determination of the issues presented.

Cornell alleges that the circumstances and conditions leading to the order complained of by plaintiff in this suit are substantially as follows:

Cornell is a corporation under the laws of the State of New York with its principal office in Kingston, N. Y., and

has been engaged in the business of towage on the Hudson River since 1837, or for a period of 115 years. The Interstate Commerce Commission by certificate and order dated February 2, 1943, certified that "public convenience and necessity require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our [the Commission's] order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River" and granted authority to the carrier to perform the service so described. Cornell is thus [fol. 48] limited to towage rights. Plaintiff is limited to freighting rights on the same waters.

Cornell further alleges that beginning April 17, 1949, plaintiff by its tariff I. C. C. No. 2 provided for deductions from rates to apply via tug and scow between various points shown in the tariff. Such deductions are referred to in the tariff as in each case "allowance for use of shipper's scow" if "the scow is furnished by the shipper". Free time and demurrage rules are made inapplicable when the scow is furnished by the shipper and credit is allowed in certain amounts if the carrier is not required to return the customer's scow to point of origin. The rates named were stated in the tariff not to include insurance. The net rates so published by plaintiff equaled the towage rates published by Cornell.

Cornell by telegram dated May 11, 1949, complained to the Commission that the service provided for in plaintiff's tariff I. C. C. No. 2 was in substance towage service, that the performance thereof violated plaintiff's certificate authorizing only freighting service, and that such unlawful practice should be prohibited.

Plaintiff was not able immediately, through the tariff device above described, to divert traffic from Cornell but by a supplement, namely No. 2 to its ICC tariff No. 2, effective March 26, 1950, it made sharp reductions in its published rates covering the transportation of bricks, without change as to allowance deductions, and thereby diverted a large and important part of Cornell's traffic from it, and

caused it serious injury, amounting in one year alone to over $258,000 in lost revenues.

Action by the Commission on Cornell's complaint was deferred pending action in a similar proceeding known as *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417 (decided June 13, 1950). Plaintiff informed the Commission on September 25, 1950 that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie Carriers case* when the order therein became effective. The order became effective on December 26, 1950.

By letter dated December 27, 1950, the Director of the Bureau of Water Carriers and Freight Forwarders called [fol. 49] attention to the finality of the *Dixie Carriers case*, referred to further complaint by Cornell with respect to adverse effects of the allowance tariff in question, pointed out that plaintiff's service under such tariff appeared to be unauthorized towage, and called upon plaintiff to desist from such unauthorized operation.

Thereafter on January 5, 1951, plaintiff filed a petition with the Commission stating that it believed itself "entitled to the benefit of a formal proceeding" and to "be afforded an opportunity of distinguishing the holding of Division 2 in the Dixie Carriers case from the facts in its own case". The prayer of the petition was that the Commission "interpret its position in a formal proceeding and to find thereafter that its present tariff provisions with respect to allowances are just and reasonable and that it is, under its certificate, legally authorized to publish and observe such provisions in its relations with its shippers". Such petition was entitled "Petition for Interpretation and Formal Disposition of Telegraphic Complaint" and contained no reference to any claimed revocation of, or unauthorized change in, plaintiff's certificate or the certificate of its predecessor in interest. Nor was there any mention in the petition of claimed lack of authority in the Commission to frame the certificates as written.

The Commission on February 6, 1951, gave notice of a hearing on plaintiff's petition for interpretation and on the complaint of Cornell alleging performance of unauthorized

towage by plaintiff. The hearing was held on February 23, 1951.

Cornell and three other towing companies and an inland waterways association intervened in opposition to plaintiff. Cornell presented evidence in opposition.

Thereafter a brief was filed by plaintiff in support of its contentions and a reply brief was filed by Cornell. On May 28, 1951, the Examiner who heard the case rendered his proposed report and therein found and concluded that the operation by plaintiff under the tariffs in question was and is towage and, therefore, beyond the authority granted to it in its certificate of convenience and necessity.

[fol. 50] Plaintiff filed exceptions to the proposed report and Cornell replied thereto.

Division 4 thereafter issued its report and order dated October 18, 1951, set forth as Exhibit No. 4 to the complaint herein, dealt more fully with plaintiff's contentions, and sustained the Examiner's conclusions that plaintiff was and is performing unauthorized towage under its tariffs. The division found that the published charges and allowances to the extent they cover such towage service are unlawful, and ordered cancellation of such unlawful charges and allowances.

Plaintiff subsequently filed a petition for reconsideration by the entire Commission of said report and order of Division 4, and Cornell filed a reply thereto. On March 17, 1952, the Commission entered its order (set forth as Exhibit No. 4 to the complaint herein) denying the petition and thereby affirming the report and order of Division 4.

Cornell alleges that the Commission has afforded plaintiff full opportunity to be heard, has deliberately and carefully considered plaintiff's contentions, and has properly found them to be without merit. Cornell further alleges that the order of October 18, 1951, by Division 4, as affirmed by the Commission's order of March 17, 1952, was made after a full and fair hearing, is amply sustained by the evidence in the record before the Commission, is in full compliance with the statutory standards of the Interstate Commerce Act and the requirements of the Administrative Procedure Act, and is valid and lawful.

VII

Cornell denies the allegations of fact in paragraph VII of the complaint.

VIII

Cornell denies the allegations in paragraph VIII of the complaint. Further in respect to the sub-paragraphs of paragraph VIII of the complaint Cornell alleges:

[fol. 51] (1) As to sub-paragraph 1 of the complaint the Commission's order complained of by plaintiff does not in any manner change, modify or annul plaintiff's outstanding certificate authorizing it to operate but instead is a ban against abuse of the authority actually granted by such certificate, in ordering plaintiff to cease and desist from its unlawful and unauthorized towage practice through the guise of allowances under its tariffs.

(2) As to sub-paragraph 2 of the complaint, the Commission under the provisions of the Interstate Commerce Act and the National Transportation Policy is vested with the duty and responsibility to issue certificates of convenience and necessity authorizing services by common carriers by water when shown to have been performed during the critical "grandfather" period provided for in the Act or are shown to be required by public convenience and necessity. In the system of regulation thus provided for by statute the Commission has a duty of describing in such certificates the operations to be authorized by the types of equipment to be employed, in order that the competitive balance as between carriers may not be disrupted by new services without securing the appropriate authority from the Commission. Cornell, for example, is authorized to perform only towage on the Hudson River in the territory within which Callanan is authorized to perform only freighting, namely transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels. Plaintiff's certificate does not include towage, because neither under the "grandfather" provisions of the statute nor the provisions requiring a showing of public convenience and necessity has it, or its predecessor in interest, Joseph R. Hutton, shown that it had been engaged in towage services or that such services were required by public

convenience and necessity. Plaintiff's amended certificate and order, dated March 7, 1944, describing plaintiff's authorized service to be a freighting service, namely, by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels did not include towage authority, and plaintiff and plaintiff's predecessor in interest consented to such amended certificate. Neither can now attack in this proceeding such amended certificate over eight [fol. 52] years after it became effective and after time for reconsideration thereof under the Commission's rules has expired. At the time such amended certificate was entered in 1944, the Commission by its decisions had made plain that freighting service as described in such amended certificate was and is different from, and exclusive of, towage service and that separate authority to perform the latter is necessary. Plaintiff, as hereinabove set forth, did not in the petition for interpretation, filed with the Commission on January 5, 1951, mention or refer to its present claim that the amended certificate effected a partial revocation of the pre-existing certificate. Plaintiff admitted at the hearing before the Commission that its certificate included freighting and not towing authority. Its claim as to partial revocation was made for the first time after such hearing. As hereinabove shown when transfer to plaintiff of the operating rights in such amended certificate was authorized by the Commission's order of August 18, 1947, in so far as such rights applied on the Hudson River, and when the second amended certificate, dated February 5, 1948, was issued to plaintiff, with the same description of the freighting service as contained in the amended certificate of 1944, plaintiff made no objection thereto but consented to the terms thereof.

At the same time, namely, on January 5, 1951, when plaintiff filed said petition for interpretation, it filed with the Commission (a) an application seeking authority under section 309 of the Interstate Commerce Act to perform towage on the Hudson River and requesting the issuance of a certificate of convenience and necessity specifying such service, and (b) an application seeking authority to acquire towage operating rights from another water carrier, L. B. Shaw, Inc. Both applications were heard before

an Examiner and were denied by Division 4 in docket No. W-103 (Sub. No. 1) *The Callanan Road Improvement Company Extension—Towage*, and Finance Docket No. 17202, *The Callanan Road Improvement Company Purchase, etc.*, decided May 9, 1952.

Cornell alleges that plaintiff in the present proceeding seeks to distort and expand the operating authority granted to it by the Commission to include towage services which are beyond the terms of its certificate and which in a sepa- [fol. 53] rate proceeding have been shown not to be required by public convenience and necessity because of adequate existing towage services. Plaintiff further alleges that the Commission was authorized by the Interstate Commerce Act to specify the service to be rendered by plaintiff and the type of equipment to be used by it as set forth in the certificate granted to said carrier.

(3) As to sub-paragraph 3 of the complaint, the Commission on March 7, 1944, by its amended certificate properly clarified the certificate of July 17, 1942, issued to plaintiff's predecessor in interest to conform such certificate to the service which such predecessor in interest had shown itself entitled to perform, namely, freighting by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels and not towage. The certificate thus amended was consented to by such predecessor in interest and by plaintiff at the time transfer of operating rights under such certificate was authorized by the Commission by its order of August 18, 1947, and at the time the second amended certificate was issued to plaintiff on February 5, 1948. The Commission's action in issuing both the amended certificate and the second amended certificate was in accordance with law and pursuant to the authority properly vested in it.

(4) As to sub-paragraph 4 of the complaint an allowance could properly be made to a shipper under section 314 of the Interstate Commerce Act only in respect to a service which the carrier itself is authorized to perform. Plaintiff has no authority to perform towage and the allowances to shippers provided for in plaintiff's tariff are unauthorized and unlawful because such allowances are in respect to towage not permitted by plaintiff's certificate.

(5) As to sub-paragraph 5 of the complaint, Cornell denies that the Commission's order complained of violates section 8(b) or any other section of the Administrative Procedure Act and denies that such order is unlawful, void, arbitrary or capricious in any respect whatsoever. Cornell further denies that the Commission and the Examiner failed or refused to make required rulings or to state their reasons or basis upon each finding, conclusion, and excep-
[fol. 54] tion presented by plaintiff upon material issues. Plaintiff neither in its exceptions to said proposed report of the Examiner nor in its petition for reconsideration by the entire Commission raised any question as to compliance with, or violation of, any of the provisions of the Administrative Procedure Act, and such contentions may not now be properly made here.

Further as to sub-paragraph 5 of the complaint and the allegation by plaintiff "that the Commission is without authority in law to promulgate the order complained of herein for the reason that the transportation activity of plaintiff is in intrastate commerce and not subject to the jurisdiction of the Interstate Commerce Commission", such contention was mentioned in plaintiff's brief filed before the examiner but was not made before Division 4 or the Commission in either plaintiff's exceptions or its petition for reconsideration, and cannot now be made before this court in the absence of initial determination by the Commission.

Furthermore, Cornell alleges that the evidence before the Commission in the proceeding in which the order here complained of was made showed that some of Callanan's traffic moved between New York points and New Jersey points, and thus moved in interstate commerce. Plaintiff's certificate authorizing it to perform transportation applies only in respect to "interstate or foreign commerce". Tariffs only in respect to interstate or foreign commerce are required to be filed with the Commission. Yet plaintiff filed tariffs with the Commission, including the tariff providing for allowances condemned by Commission's order herein complained of by plaintiff. Plaintiff's filing of tariffs with the Commission, its filing of applications with the Commission for authority to acquire towage operating rights

and for authority to perform towage, and its filing of a petition for interpretation of its present certificate are a recognition by it of the Commission's jurisdiction over its operations and the interstate character thereof. The geographical boundary between the State of New Jersey and the State of New York follows the middle of the Hudson River (4 Stat. L. 708) from the 41st degree of north latitude near Yonkers, N. Y., to the main sea. Article 25 of the Inland Rules of Navigation (33 U. S. C. A. sec. 210), applies [fol. 55] to this channel, particularly in the vicinity of Yonkers, and requires vessels to "keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." In practice, therefore, plaintiff in towing bricks under the tariff here in issue from New York points on the Hudson River north of Yonkers to points in New York Harbor must pass from New York waters to New Jersey waters and must engage in interstate commerce. Cornell, therefore, denies that plaintiff is not engaged in interstate or foreign commerce and denies that the Commission is without jurisdiction complained of by plaintiff.

Wherefore, Cornell Steamboat Company prays that the complaint in this proceeding be dismissed.

Cornell Steamboat Company, by Its Attorneys: Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C.; Reilly & Reilly, by Desmond F. Reilly, 200 State St., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., of Counsel.

July 15, 1952.

[fol. 56] EXHIBIT "A" TO ANSWER

Second Amended Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 5th day of February, A. D. 1948

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

It appearing, That on March 7, 1944, the Commission, division 4, issued an amended certificate and order in the above-entitled proceeding, authorizing Joseph R. Hutton to engage in water-carrier operations as therein specified;

It further appearing, That on August 18, 1947, the division reopened the said proceeding and made and filed its report and entered its order in Finance Docket No. 15669, Joseph R. Hutton Certificate Transfer, approving transfer to The Callanan Road Improvement Company of the said amended certificate and order of March 7, 1944, to the extent that such amended certificate and order authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points;

It further appearing, That such transaction has been consummated and due notice thereof has been given; that the said amended certificate and order of March 7, 1944, should be superseded and canceled to the extent it authorizes operation as a water carrier, in interstate or foreign commerce, between points in the area defined by the order of the Commission, division 4, entered March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto,* and points along the Hudson River below its junction with the Erie Canal of the New York State Canal System, and in lieu thereof a second amended certificate should be issued to The Callanan Road Improvement Company;

And it further appearing, That transferor has no intention of continuing in service as a water carrier and has assented to cancelation of the said amended certificate of March 7, 1944, to the extent it authorizes operation, in inter-

state or foreign commerce, on the Erie and Oswego Canals of the New York State Canal System and the Niagara River:

It is hereby certified, That public convenience and necessity require operation by The Callanan Road Improvement Company as a common carrier by water, by self-propelled [fols. 57-59] vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of the Commission, division 4, entered March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, and points along the Hudson River below and including Waterford, N. Y.

It is ordered, That said carrier be, and it is hereby, authorized to operate as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this second amended certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the said amended certificate and order issued March 7, 1944, to the extent it authorizes operations as a water carrier, in interstate or foreign commerce, on the Erie and Oswego Canals of the New York State Canal System and the Niagara River, be, and it is hereby, vacated and set aside; and that the application filed in the above-entitled proceeding, to the extent it sought authority to perform service on those waterways, be, and it is hereby, dismissed.

And it is further ordered, That the said amended certificate and order issued March 7, 1944, to the extent it authorizes operation as a water carrier, in interstate or foreign commerce, between points in the area defined by the order of the Commission, division 4, entered on March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, and points along

the Hudson River below its junction with the Erie Canal of the New York State Canal System, be, and it is hereby, superseded and canceled as of the date this second amended certificate and order takes effect; and that this second amended certificate and order shall take effect on, and be in force on and after, March 19, 1948.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 59a] [File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING CORNELL STEAMBOAT COMPANY PERMISSION TO INTERVENE AND FILE ANSWER—August 5, 1952

This cause coming on to be heard at this term on the motion of Cornell Steamboat Company, by its counsel, for leave to intervene in the above-entitled cause, to be made party defendant herein, and to file its answer, a copy of which is attached to the motion herein; and upon consideration of such motion, it is this 5th day of August, 1952, ordered, adjudged and decreed as follows:

Said motion by Cornell Steamboat Company for leave to intervene as party defendant and for leave to file its said answer herein be, and the same hereby is, granted.

James T. Foley, Judge of the District Court of the United States for the Northern District of New York.

[fol. 60a] [File endorsement omitted.]

[fol. 61] In United States District Court for the Northern District of New York

The Callanan Road Improvement Company, Plaintiff,

v.

United States of America and Interstate Commerce Commission, Defendants

Opinion—September 15, 1952

Before Clark, Circuit Judge; Brennan, Chief Judge, and Foley, District Judge

Action by The Callanan Road Improvement Company to enjoin and set aside an order of the Interstate Commerce Commission of October 18, 1951, 285 I.C.C. 75, affirmed on reconsideration March 17, 1952, wherein Cornell Steamboat Company was permitted to intervene as a defendant. Judgment for defendants dismissing the action on the merits.

James E. Wilson, Washington, D. C. (Thomas W. Cantwell, Albany, N. Y., on the brief), for plaintiff.

William J. Hickey, Sp. Asst. to Atty. Gen. (Newell A. Clapp, Acting Asst. Atty. Gen., James E. Kilday, Sp. Asst. to Atty. Gen., and Edmund Port, U. S. Attorney, on the brief), for the United States.

H. Neil Garson, Atty., Interstate Commerce Commission, Washington, D. C. (Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Washington, D. C., on the brief), for Interstate Commerce Commission.

R. Granville Curry, Washington, D. C. (Curry and Dolan and Frederick M. Dolan, all of Washington, D. C., Thacher, Proffitt, Prizer & Crawley and Paul L. Clugston, all of New York City, and Reilly & Reilly, and Desmond F. Reilly, all of Albany, N. Y., on the brief), for Cornell Steamboat Co.

Clark, Circuit Judge:

This is an action in usual form and course, 28 U.S.C.A. §§ 1336, 1398, 2284, 2321-2325, 49 U.S.C.A. §§ 17(9), 916(a), to set aside and enjoin the enforcement of an order of the

Interstate Commerce Commission which regulates the competition between certain common carriers by water on [fol. 62] the Hudson River in New York and New Jersey. The plaintiff, holding the Commission's certificate of public convenience and necessity for "freighting," is endeavoring to extend this to including "towing," basing its contention on several points, of which the most far-reaching is the assertion of lack of power in the Commission to limit its certificate so as to exclude towing. Several competitors intervened before the Commission, but the brunt of the opposition was borne by the initial objector to plaintiff's activities, Cornell Steamboat Company. Cornell's opposition has continued to this action wherein it has been granted intervention and has been an active defendant. The Commission's decision has been against the plaintiff. We think the Commission was right.

Consideration of the case must start with the enactment in 1940 of Part III of the Interstate Commerce Act dealing with "Water Carriers," wherein no common carrier by water is permitted to engage in transportation under the Act unless it holds a certificate of public convenience and necessity issued by the Commission, but with "grandfather" rights, to be established by and before the Commission, to those in business on January 1, 1940. § 309(a), 49 U.S.C.A. § 909(a). The Commission held Cornell's tugboats to be "water carriers" and Cornell itself a common carrier under Part III of the Act in decisions reported in 250 I.C.C. 301, 577, which were sustained on appeal to the courts. *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 affirming D.C.S.D.N.Y., 53 F. Supp. 349. The Commission did, however, grant Cornell a certificate of public convenience and necessity for towing, based on its grandfather rights, for it had been in the towage business on the Hudson River for 115 years. This certificate it still holds and on this basis it conducts its business.

The basis for plaintiff's asserted rights requires a more extensive statement. Plaintiff's predecessor in interest was one Joseph R. Hutton, who, during the crucial grandfather period prior to January 1, 1940, owned and managed one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit. The power [fol. 63] boat was used in towing the barges and constructed

so as to carry also about 150 gross tons of freight. On occasions other barges were rented or chartered for operation in Hutton's fleet, and they transported items running all the way from wheat and wastepaper to pig and scrap iron and fertilizer from or to points in New York Harbor up the Hudson River and the State Barge Canal as far as the Niagara River. Hutton, having failed to secure complete exemption from the Commission, then sought a certificate based on grandfather rights; and this the Commission granted on July 17, 1942. *Hutton Contract Carrier Application*, 250 I.C.C. 804. In this report, Division 4 made definite findings, as just stated, of the extent of Hutton's prior operations—he had been in business for 37 years, and his ancestors had operated before him—and found that he was a common carrier, and not a contract carrier, "of commodities generally" between the points named. Its "Certificate and Order" incorporated this report as a part of itself and inter alia ordered that the applicant be "authorized to continue operations as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Meanwhile the Commission had had occasion to state the distinction between freightage and towage. *Cornell Steamboat Co. Contract Carrier Application, supra*, 250 I.C.C. 301, 304, 305; *Eastern Transp. Co. Contract Carrier Application*, 250 I.C.C. 505, 508. This was not a new idea; it went back to well-known differences in admiralty shown by the difference in liability of a tower and of a common carrier of freight. *Stevens v. The White City*, 285 U.S. 195, 200. In these decisions in 1942, the Commission, while noting the distinction, did not require a distinct specification as to each in its certificates. That came in *Campbell Transp. Co., Common Carrier Application*, 260 I.C.C. 107, Dec. 14, 1943, wherein the Commission definitely established that "Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freighting by barges and towboats did not perform such towage service for shippers during the 'grandfather period.' Carriers whose certificates or permits do [fol. 64] not specifically authorize the performance of towage are without authority to engage in such service."

On March 4, 1944, the Commission of its own motion ordered the Hufton application opened for reconsideration and filed a report and amended certificate and order. *Hutton Contract Carrier Application*, 260 I.C.C. 804. Herein Divison 4 of the Commission pointed out that in its prior report it had not specified the "type of vessels" to be used by the applicant in the exercise of the authority granted, and that in the absence of any limits in the certificate, "applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date." Accordingly it modified the authority previously granted to the vessels then operated by the applicant, and again it recited the plaintiff's flotilla as above set out and made findings accordingly. And the amended certificate and order certified, "That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the area" substantially as defined before, and ordered that the said carrier be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The previous certificate and order was superseded and cancelled.

Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permited or otherwise. He died in January, 1945, and his widow as adminstratrix sold and transferred his operating rights to the plaintiff for $2,750 by a transaction approved by the Commission's Division 4 on August 18, 1947. *Hutton Certificate Transfer* (not printed in full), 265 I.C.C. 813. Because an association of water carriers operating on the State Canal Systems protested and because plaintiff was not then operating in the [fol. 65] Canal, the certificate transfer granted plaintiff only the right of operation on the Hudson from Waterford (the point of intersection with the Canal) to New York Harbor. As the report herein below, 285 I.C.C. 75, shows,

the sale was consummated in September, 1947; and an amended certificate, limited to the Hudson, but otherwise authorizing the same operations as were permitted in the amended Hutton certificate, was issued to plaintiff on February 5, 1948. Plaintiff owns two towboats and charters others. It produces crushed stone at Kingston, N. Y., and transports it down the Hudson in its vessels for sale and delivery in the New York Harbor area. In the same tows it also operates as a carrier for hire in the movement of brick loaded on its own or chartered scows. As to these activities no question is raised; the issue arises as to its movement also of scows of the shippers, for which it makes allowance in accordance with its tariff, I.C.C. No. 2, which it initiated in 1949 and which became effective April 17, 1949. The shippers' scows have a captain on board responsible to the shipper or scow owner and paid by him. The plaintiff also returns the empty scows, where required, and does not claim the right itself to fill them or use them on return.

On May 11, 1949, Cornell complained to the Commission that this tariff embodied rates which contemplated the service of mere towage in violation of the plaintiff's certificate. On September 19, 1950, a representative of the Commission notified plaintiff that the towage operations would be unlawful, citing *Dixie Carriers, Inc., Rates and Allowances*, 278 I.C.C. 417, wherein Division 2 of the Commission had reiterated the previous rulings of the Commission that towage was not permitted unless specifically authorized in the enabling certificate. On January 2, 1951, plaintiff filed a petition with the Commission for interpretation and formal disposition of the Cornell complaint. Cornell in its reply reiterated its position, and hearings and proceedings on a proposed report and exceptions thereto finally culminated in the report and order here under attack. The report by Division 4 concluded with the view "that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 [fol. 66] of the act, and that the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful." And its order cancelled the rates, charges, and allowances de-

scribed, and discontinued the proceeding. The report, 285 I.C.C. 75, has a complete statement of facts, to which we make reference and which we accept as our own. As a matter of fact there is substantially no conflict as to the basic facts; the issue arises as to the law applicable.

After this order plaintiff petitioned for reconsideration and Cornell replied. The petition was denied by the entire Commission on March 17, 1952, and this action followed on April 10, 1952. Plaintiff has also made other direct applications to the Commission for towage rights, all of which have been denied. These are not before us in this action.

Certain contentions, albeit vigorously urged by plaintiff, we believe can be shortly answered. Plaintiff says that it, too, is engaged in freighting, not towing, that in any event Hutton's initial certificate constituted authority to engage in the activity it now contemplates, and that the Commission lacks authority to revoke a certificate once permanently and definitively granted, cited *United States* v. *Seatrain Lines*, 329 U.S. 424. The first contention rests on concessions always made by the Commission, and stated, for example, in both the *Campbell* and *Dixie* cases, that a carrier engaged in a freighting service might employ the scows of others, including shippers, so long as it used them for its freighting purposes and did not merely transport them as service to the owners. But we agree with the Commission that the facts do not permit of such an interpretation of plaintiff's activities. The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner [fol. 67] at origin, the control of the scows by shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment. In fact it is because of this operation and the rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that

plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year.

So the claimed revocation is substantially different from that in the *Seatrain* case, an outright and unconsented-to limitation of a broad certificate, which we shall discuss more at length below. Even under the principle of that case it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights. But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered. In the very report approving the transfer, the Commission answered the there protestant's objection based upon the *Seatrain* case by referring to this consent of the applicants. Plaintiff's present attempt to expand its grant is an obvious afterthought simulated by the exigencies of its competition with Cornell. In fact its present position would seem a collateral attack upon its own certificate which was the Commission's ultimate and decisive act as to it. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 448. But we prefer to place decision upon the broader ground of the Commission's power to make the classification it is now so extensively employing. To that issue we now turn.

Here the plaintiff's position is that the Commission's [fol. 68] powers are limited to the grant of the certificate of convenience and necessity and that it lacks power to specify the type of service to be rendered by a carrier after it has been certificated. Here, too, its reliance is upon *United States* v. *Seatrain Lines, supra.* In that case the Commission, having granted Seatrain a certificate for the carriage of "commodities generally" to certain ports, was held not empowered to recall it and substitute a cer-

tificate limited to carrying liquid cargoes in bulk, empty railroad cars, and property located in freight cars received from and delivered in railroad carriers, that is, the so-called "car-ferry service." But while there are some superficial resemblances, we think the differences between that case and this are substantial and decisive.

Seatrain had long been a common carrier of goods by water. It had developed a distinctive type of service for which its harbor facilities and vessels had been constructed, namely, that of ferrying freight cars in the form received from railroads. But, and this is important, it also carried commodities generally. So in 1941 it filed two applications, one for grandfather rights from New York to New Orleans, La., as it had operated since 1932 and one for new rights from New York to Texas City, Tex., on a route which it had begun to operate in 1940. In each case it described its operation as that of a "common carrier by water of commodities generally." After notice, hearing, and investigation, Division 4 of the Commission satisfied itself of Seatrain's rights thus to engage in transportation on both the routes as such a common carrier; and in 1942 a single certificate was duly issued authorizing Seatrain to carry "commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." In 1944 the Commission, of its own motion, reopened the proceedings and against Seatrain's protect (carried eventually by direct action to the Supreme Court) cancelled the former certificate and issued the limited one noted above. The Supreme Court, affirming the decision below, *Seatrain Lines v. United States*, D. C. Del., 64 F. Supp. 156, held that this involved more than a correction and constituted a change [fol. 69] of policy and that no such power of revocation was granted the Commission. Then it went on to consider the Commission's argument that "this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under § 309(d) [49 U.S.C.A. § 909(d)] to fix 'terms, conditions, and limitations' for water carrier certificate holders." It said: "Whether the Commission could, under this authority, have imposed a restriction in an original

certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt." Then it pointed out certain differences between the power over water carriers of § 309(d) and the corresponding power over motor carriers of § 208, 49 U.S.C.A. § 308, which—unlike the power here—expressly authorized the Commission to "specify the service to be rendered" by those carriers. Thus it held certain of its decisions as to the regulation of motor carriers "not controlling as to the Commission's power to regulate the details of the service of water carriers" and concluded, "We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix 'terms and conditions.'" *United States* v. *Seatrain Lines, supra*, 329 U. S. at pages 431, 432.

Certain differences in the legal situation and the equities are at once obvious. Here the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted. What we are dealing with is a later attempt to expand those rights beyond anything covered or contemplated by the grandfather privilege. There Seatrain fought throughout to preserve rights it had definitely exercised, some throughout the grandfather period in fact, and rights which the Commission had recognized with finality before it sought, after an interval, to take them away. In fact, Judge Biggs for the court below, D. C. Del., 64 F. Supp. 156, relied as an additional ground for reversal on the expenditures and large commitments made by Seatrain in reliance upon the original certificate, a point not reached by the Supreme Court. But we shall [fol. 70] pass all this, for we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of "the details of service," but a "just and reasonable classification of groups of carriers included in the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require" which the Commission is expressly authorized to establish. § 304(c), 49 U.S.C.A. § 904(c).

The Commission's reasons for its classification are stated not only in its decisions we have cited above, but also in

others of long standing. Thus in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, Division 4 limited the applicant's service to transportation by barge, that being the type it had furnished, and said: "Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to Part III of the act." And the necessity of such classification to execute the Congressional intent to preserve grandfather rights and prevent the expansion of monopoly to upset the balance existing up to 1940 is stressed in detail in cases such as *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313. Other cases, too numerous to mention, have been cited to us where the Commission has acted either to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towage alone. And the Supreme Court has sustained such certificates, albeit without discussion of this specific point. See *Warner* v. *United States*, 341 U. S. 907, affirming on motion, D.C.W.D. Tenn., 97 F. Supp. 580 (re-[fol. 71] ferring to this specification on p. 582), which sustained 265 I.C.C. 543; *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175.

In making these classifications the Commission has relied not only on § 304(c) quoted in crucial part above, but also on § 309, dealing with the issue of certificates of public convenience and necessity. Thus subd. (c) of § 309 provides that the Commission shall issue a certificate "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit [etc.], * * * and

that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." And subd. (d), requiring the certificate to specify routes, also provides that "there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this chapter or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation."

Plaintiff stresses the reliance of the Court in the *Seatrain* case on the proviso as preventing the limitation of facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between "service" [fol. 72] as there considered and defined, and scope of operations as here provided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations "within the scope of such certificates"; it does not authorize an expansion of operations beyond the grandfather rights set out in subd. (a) of this section or the classification authorized by § 304 (c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as

to motor-carriers. *Cresent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States, supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

We agree, therefore, with the Commission's assertion of power to make the classification in question. We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence. *United States* v. *Detroit & Cleveland Nav. Co., supra; Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536.

Decision of this basic issue settles the case. Plaintiff attempts to rely further on the provisions of § 314, 49 U.S.C.A. § 914, authorizing a carrier to make allowances in its tariffs for services rendered by a shipper in connection with the transportation furnished, and so separately [fol. 73] supports the allowances made in its tariff for the shipper's scows. But obviously this deals with lawful transportation; it does not override earlier sections to make that lawful which is unlawful. The Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the enfire operation was illegal. *Emery Transp. Co.* v. *United States*, D.C.S.D. Ohio, 91 F. Supp. 644, 646, affirmed 339 U. S. 955.

Plaintiff raises two further points which seem not to have been raised, or in any event pressed, below. The first is that the Commission's statement of findings, conclusions, and ruling are somehow inadequate under the terms of § 8(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1007(b). This objection seems to border on the frivolous,

particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt. Whatever the reach of the A. P. Act, we think the findings entirely adequate and complete, indeed praiseworthily so. The other is the claim that the Commission lacks jurisdiction because the transportation in question was in intrastate commerce. But this claim was specifically set at rest in *Cornell Steamboat Co.* v. *United States; supra.* The New Jersey state line starts at the middle of the Hudson River from a point north of Yonkers down past New York City, and the transportation is in interstate commerce.

Accordingly the defendants must have judgment. The clerk is directed to enter judgment for the defendants, dismissing the action on the merits, immediately on the filing of this opinion.

Charles E. Clark, U. S. Circuit Judge; Stephen W. Brennan, U. S. District Judge; James T. Foley, U. S. District Judge.

Dated September 15, 1952.

[fol. 73a] [File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, feeling itself aggrieved by the final judgment of the United States District Court for the Northern District of New York, entered in said Court on September 15, 1952, prays an appeal from said judgment to the Supreme Court of the United States.

The particulars wherein it considers the judgment erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said judgment was made and

entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 74a] [File endorsement omitted.]

[fol. 75] In United States District Court

[Title omitted]

Notice of Appeal—Filed November 13, 1952

To United States of America and Interstate Commerce Commission, Defendants, and Cornell Steamboat Company, Intervenor:

You are hereby notified that the United States District Court for the Northern District of New York, on November 7, 1952, filed and entered an order allowing an appeal by The Callanan Road Improvement Company, plaintiff, to the Supreme Court of the United States from a judgment filed and entered on September 15, 1952, in the above-entitled cause, and that the citation signed by such court on November 7, 1952, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, plaintiff's jurisdictional statement pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

[fol. 76] Dated November 7, 1952.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

Service of the foregoing notice and the documents thereto and receipt of a copy thereof are hereby acknowledged and accepted this 10th day of November, 1952.

Charles H. Weston, Attorney for United States of America, Defendant. Edward M. Reidy, Attorney for Interstate Commerce Commission, Defendant. R. Granville Curry, Attorney for Cornell Steamboat Co., Intervenor.

[fol. 76a] [File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, in connection with its appeal, files the following assignment of errors upon which it will rely in the prosecution of its appeal to the Supreme Court of the United States from the final judgment of the District Court dated September 15, 1952. The District Court erred:

(1) In failing to hold that the order of the Interstate Commerce Commission, by Division 4, dated October 18, 1951, as affirmed by an order of the entire Commission of March 17, 1952, constitutes a revocation of plaintiff's certificate authorizing it to operate as a common carrier by water by non-self-propelled vessels with the use of separate towing vessels.

(2) In failing to hold that the order of Division 4 of the Commission of October 18, 1951, as affirmed by the order of March 17, 1952, constitutes the specification of service plaintiff may or may not render under its certificate of public convenience and necessity, which authority has not been delegated to the Commission by the Congress either expressly or impliedly.

(3) In failing to hold that the action of the Commission [fol. 78] in revoking, modifying and setting aside the certificate of plaintiff's predecessor in interest of July 17, 1942,

was and is not authorized by the Interstate Commerce Act applicable to water carriers.

(4) In failing to hold that the order of Division 4 of the Commission, dated October 18, 1951, as affirmed by the order of March 17, 1952, is unlawful, void, arbitrary and capricious as said orders violate section 8(b) of the Administrative Procedure Act.

(5) In failing to hold that the Commission's orders in question constitute a revocation of the allowance provisions of the Interstate Commerce Act.

(6) In failing to grant the prayer of plaintiff's complaint.

(7) In failing to perpetually enjoin and set aside the operation, execution, effect and enforcement of said order of October 18, 1951, as affirmed by the order of March 17, 1952.

Wherefore, the plaintiff, The Callanan Road Improvement Company, prays that said judgment of September 15, 1952, be reversed.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 78a] [File endorsement omitted]

[fol. 79] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in said cause entered on September 15, 1952, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is ordered and decreed, that said appeal be, and the same is hereby, allowed as prayed for.

Dated November 7, 1952.

James T. Foley, United States District Judge.

[fol. 79a] [File endorsement omitted]

[fols. 80-81] Citation in usual form showing service on Charles H. Weston et al. omitted in printing.

[fols. 82-83] STATEMENT BY PLAINTIFF DIRECTING ATTENTION TO PARAGRAPH 3 OF RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES—(Omitted in printing)

[fol. 84] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S (APPELLANT'S) PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 13, 1952

To the Clerk of the above-named Court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to wit:

(1) Complaint of The Callanan Road Improvement Company, dated April 10, 1952, together with exhibits 1-4, inclusive.

(2) Answer of the Interstate Commerce Commission.

(3) Answer of the United States.

(4) Order constituting three-judge court.

(5) Motion of Cornell Steamboat Company for leave to intervene as a defendant.

(6) Order of Court allowing intervention of Cornell Steamboat Company, as a defendant.

(7) Answer of Cornell Steamboat Company.

(8) Record of the Interstate Commerce Commission in Docket No. W-103 entitled *Joseph R. Hutton Contract Car-*
[fols. 85-86] *rier Application*, as offered in evidence herein by plaintiff.

(9) All other records of proceedings as offered in evi-

dence herein by plaintiff, intervenor, or other parties, and in the event no such records were offered as evidence, statement of the Clerk to the effect that records transmitted under (8) above constitute all records of the Interstate Commerce Commission offered in evidence herein.

(10) Findings of fact and conclusions of law entered by the Court on September 15, 1952.

(11) Final judgment of the Court entered September 15, 1952.

(12) Plaintiffs petition for appeal.

(13) Notice of appeal and acknowledgment of service.

(14) Assignment of errors.

(15) Order allowing appeal.

(16) Citation on appeal.

(17) Statement of jurisdiction of the Supreme Court of the United States.

(18) Statement of plaintiff directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

(19) Praecipe for transcript of record and acknowledgment thereof, and

(20) All docket entries in their appropriate order.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 86a] [File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT.

Civil 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, a Corporation, South Bethlehem, New York, Plaintiff,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

CORNELL STEAMBOAT COMPANY, Party Defendant

DOCKET ENTRIES

1952

Apr. 11. Filed Complaint and issued Summons, 1 Orig. and 4 copies, $15.00.

Apr. 16. Filed Summons served Apr. 14, 1952 on Edmund Port, U. S. Attorney; Apr. 11, 1952 on Secretary, Interstate Commerce Commission, by registered mail for Interstate Commerce Commission; Apr. 11, 1952 on The Attorney General for the United States of America, by registered mail.

May 6. Filed Notice and Order & entered Order constituting District Court of Three Judges.

June 7. Filed Answer of the Interstate Commerce Commission.

June 14. Filed Answer of United States of America.

July 18. Filed Motion and Notice of Motion for Intervention and an Original Answer of Cornell Steamboat Company, returnable Albany, July 25, at 11 A. M.

Aug. 5. Filed and entered Order granting Cornell Steamboat Company, permission to intervene and file Answer.

Aug. 5. Filed and entered Order fixing time for hearing —Aug. 12, 1952—Albany, N. Y.

Aug. 5. Filed Notice pursuant to Sec. 2284, Title 28, U. S. C. A. with certificate of service (Mailed copy of Notice to Hon. James P. McGranery, Atty. Genl. of U. S. Dept. of Justice, Washington, D. C.; Hon. Edmund Port, U. S. Atty., Syracuse, N. Y., Thacher, Proffitt, Prizer & Crawley, Esqs. (Desmond F. Reilly, Esq. of Counsel, 72 Wall St., New York 5, N. Y.)

Aug. 12. Filed 3 packages certified record of Interstate Commerce Commission.

Sept. 15. Filed Opinion of Statutory Court dismissing Complaint.

Sept. 15. Entered Judgment dismissing Complaint.

Sept. 15. Notified all attorneys of record, of entry of judgment.

Aug. 12. Hearing on an order revocating order of Interstate Commerce Commission and for Injunction (Hon. Chas. E. Clark, Circuit Judge; Hon. Stephen W. Brennan, U. S. D. Judge and Hon. James T. Foley, U. S. D. J.)

Decision reserved.

Nov. 13. Filed Petition for Appeal.

Nov. 13. Filed and entered Order allowing Appeal to Supreme Court of United States from final judgment of U. S. District Court, entered Sept. 15, 1952.

Nov. 13. Filed Notice of Appeal, $5.00.

Nov. 13. Filed Plaintiff's (Appellant's) Praecipe for Transcript of Record.

Nov. 13. Filed Statement by Plaintiff directing attention to Par. 3 of Rule 12 of the Revised Rules of the Supreme Court of U. S.

Nov. 13. Filed Citation on Appeal.

Nov. 13. Filed Assignment of Errors.

Nov. 13. Filed Statement as to Jurisdiction.

Nov. 22. Filed Motion by Cornell Steamboat Company, intervening defendant, to affirm.

Nov. 26. Filed Motion to affirm judgment of the District Court; by Interstate Commerce Commission.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed December 23, 1952

In its brief and oral argument before this Court on its appeal in the above-entitled case, appellant will rely upon the points made in its assignment of errors.

Appellant further states that the record in this cause as filed in this Court pursuant to the praecipe for transcript of record is designated for printing except the certified record of the Interstate Commerce Commission in Docket No. W-103 entitled *Joseph R. Hutton Contract Carrier* designated as item 8 in appellant's praecipe for transcript of record and all other records as offered in evidence before the United States District Court for the Northern District of New York and designated as item 9 in appellant's praecipe for transcript of record. As to items 8 and 9 omitted as parts of the record to be printed it is believed that said items, consisting of certified copies of the testimony and exhibits before the Interstate Commerce Commission, and other related items are not necessary for extensive reference. Appellant desires, however, that said items 8 and 9 referred to above shall stand as a part of the record on appeal as original exhibits and shall not be printed, but [fol. 90] that any party and the Court may refer to such documents with the same force and effect as if they had been printed in full in the transcript of record.

James E. Wilson, De Sales Building, Washington, D. C., Thomas W. Cantwell, 75 State Street, Albany, New York, Counsel for Appellant.

[fol. 91] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

[Title omitted]

No. 488

ORDER NOTING PROBABLE JURISDICTION—February 2, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

February 2, 1953.